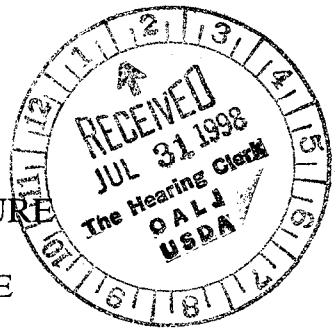

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	P & S Docket No. D-95-0049
	)	
IBP, inc.,	)	
	)	
Respondent	)	**Decision and Order**

The Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint and Notice of Hearing [hereinafter Complaint] on August 3, 1995.

The Complaint alleges that, during the period February 1994 through the present, IBP, inc. [hereinafter Respondent], purchased cattle under an exclusive marketing agreement, known as the Beef Marketing Agreement, in violation of section 202(a) and (b) of the Packers and Stockyards Act (7 U.S.C. § 192(a)-(b)) (Compl. ¶ II(a)). Specifically, the Complaint alleges that Respondent's use of the Beef Marketing Agreement gives an undue or unreasonable preference to a group of feedlots located in

Kansas [hereinafter the Beef Marketing Group]* by guaranteeing a high price for livestock purchased from the Beef Marketing Group and subjecting similarly situated feedlots in Respondent's procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase comparable quality livestock from these similarly situated feedlots under the same terms made available to the Beef Marketing Group (Compl. ¶ II). On August 28, 1995, Respondent filed Answer of IBP, inc. [hereinafter Answer], in which Respondent: (1) admits that it is subject to the Packers and Stockyards Act; (2) admits that beginning in February 1994, and continuing to the present, it purchased cattle placed with the Beef Marketing Group under the Beef Marketing Agreement; (3) admits that it has refused to purchase cattle placed with two feedlots on the same basis as offered by the Beef Marketing Group; and (4) denies that its use of the Beef Marketing Agreement violates section 202(a) and (b) of the Packers and Stockyards Act (7 U.S.C. § 192(a)-(b)) (Answer).

On December 6, 1996, Complainant filed Complainant's Prehearing Memorandum and Respondent filed Prehearing Memorandum of IBP, inc. Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] conducted a hearing in Kansas City, Missouri, from January 29, 1997, through February 7, 1997; in Washington, D.C., from

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*The Complaint alleges: (1) that the Beef Marketing Group consists of (A) Knight Feedlot, Inc., Lyons, Kansas; (B) Ward Feedyard, Larned, Kansas; (C) Barton County Feeders, Inc., Elingwood, Kansas; (D) Golden Belt Feeders, St. John, Kansas; (E) Pawnee Valley Feeders, Inc., Hanston, Kansas; (F) Great Bend Feeding, Inc., Great Bend, Kansas; and (G) Carl Dudrey, St. John, Kansas; and (2) that at one time two additional feedlots were part of the Beef Marketing Group (A) Pratt Feeders, Inc., Pratt, Kansas; and (B) Mull Farms and Feeding, Inc., Pawnee Rock, Kansas. (Compl. ¶ II(a) n.1.)

February 12, 1997, through February 21, 1997; in Sioux City, Iowa, from March 10, 1997, through March 12, 1997; and in Washington, D.C., from April 14, 1997, through April 15, 1997. JoAnn Waterfield, Esq., and Timothy Morris, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Charles W. Douglas, Esq., and William H. Baumgartner, Jr., Esq., of Sidley & Austin, Chicago, Illinois, and Lonnie O. Grigsby, Esq., and Nathan A. Hodne, Esq., of IBP, inc., Dakota City, Nebraska, represented Respondent.

On June 17, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order and Respondent filed IBP, inc[.]'s Proposed Findings of Fact and Post-Hearing Memorandum. On July 22, 1997, Complainant filed Complainant's Reply Brief and Respondent filed IBP's Response to Complainant's Proposed Findings of Fact, Conclusions, and Order. On September 25, 1997, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] concluding that Respondent did not violate section 202(a) or (b) of the Packers and Stockyards Act (7 U.S.C. § 192(a)-(b)) and dismissing the Complaint (Initial Decision and Order at 10, 30).

On November 5, 1997, Complainant appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).** On

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**The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

November 28, 1997, Respondent filed Response of IBP, inc. to Agency's Appeal Petition and Brief [hereinafter Respondent's Response] and Request of IBP, inc. for Oral Argument.

On April 24, 1998, I issued a Ruling Granting Motions for Oral Argument. On June 8, 1998, oral argument was heard in Washington, D.C. JoAnn Waterfield, Esq., appeared on behalf of Complainant. William H. Baumgartner, Jr., Esq., appeared on behalf of Respondent. On July 1, 1998, Respondent filed Motion of IBP, INC. To Correct Record [hereinafter Motion to Correct Transcript], and on July 2, 1998, Complainant filed Complainant's Proposed Corrections to the Transcript. On July 20, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Correct Transcript and Complainant's Proposed Corrections to the Transcript and a decision.

On July 22, 1998, I issued a Ruling Granting in Part and Denying in Part Respondent's Motion to Correct Transcript and Complainant's Proposed Corrections to Transcript.

Based upon a careful consideration of the record in this proceeding, I find that Respondent's right of first refusal under the Beef Marketing Agreement violates the Packers and Stockyards Act because Respondent's right of first refusal has the effect or potential effect of reducing competition. While I disagree with the Chief ALJ's conclusion that Respondent did not violate the Packers and Stockyards Act, I agree with most of the Chief ALJ's findings of fact and discussion. Therefore, except with respect to the Chief ALJ's conclusion and order, I adopt the Chief ALJ's Initial Decision and

Order as the final Decision and Order in this proceeding. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

Complainant's exhibits are referred to as "CX"; Respondent's exhibits are referred to as "RX"; and transcript references are referred to as "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 9—PACKERS AND STOCKYARDS

. . . .

SUBCHAPTER II—PACKERS GENERALLY

§ 191. "Packer" defined

When used in this chapter the term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.

§ 192. Unlawful practices enumerated

It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer or any live poultry dealer, or buy or otherwise receive from or for any other packer or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

§ 193. Procedure before Secretary for violations

(a) Complaint; hearing; intervention

Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of this subchapter, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded the packer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be

heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. . . .

(b) Report and order; penalty

If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this subchapter covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

. . . .

§ 223. Responsibility of principal for act or omission of agent

When construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer, any live poultry dealer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer, any live poultry dealer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

7 U.S.C. §§ 191, 192, 193(a), (b), 223.

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . . [Footnote 1 omitted.]

Findings of Fact

1. Respondent, IBP, inc., is a Delaware corporation with its headquarters located in Dakota City, Nebraska. [Respondent's mailing address is Box 515, Dakota City, Nebraska 68731.] Respondent is, and at all times material to this proceeding was, a packer within the meaning of the Packers and Stockyards Act [and subject to the provisions of the Packers and Stockyards Act] (Answer).

2. Respondent began operations in 1961 with one plant in Denison, Iowa. Subsequently, Respondent added 10 fed cattle packing plants in the United States and entered the pork and non-fed cattle businesses as well. (Tr. 3352-55.)

3. [Respondent typically ranks between 80 and 95 on the *Fortune* 500 list of the 500 largest corporations in the United States.] In 1996, Respondent had total sales of approximately $13 billion. Sales of products derived from fed cattle account for approximately 80 percent of Respondent's sales. (Tr. 3357-58.)

4. Respondent's primary competitors . . . are Monfort, Inc. (a subsidiary of Conagra, Inc.), Excel Corporation (a subsidiary of Cargill, Inc.), and National Beef Packing Company (a subsidiary of Farmland Foods). Together with Respondent, these packers collectively account for between 70 and 80 percent of the fed cattle slaughtered in the United States. (Tr. 3364.)

5. [Respondent maintains two packing facilities in Kansas. Respondent's Holcomb plant, also known as the Finney County plant, is located in the western portion

of Kansas (Tr. 511).] Respondent purchased its Emporia plant in eastern Kansas in 1968 and began operations there in 1969. Since [1969,] the plant's capacity has increased from 2,800 cattle per day to 4,000 cattle per day. (Tr. 2890, 3499-3500.) Respondent's Emporia, Kansas, plant generally operates 11 shifts [each week], two shifts each day[, Monday through Friday,] and one shift on Saturday. To operate a packing plant at a profit, a packer must generally operate the plant at near capacity. (Tr. 3368-69.) Respondent's Emporia, Kansas, plant employs between 2,500 and 2,600 workers. Each person is guaranteed 40 hours of work per week, even if Respondent is unable to acquire enough cattle to run complete shifts. (Tr. 3501-03.)

6. Before cattle are sold to packers in Kansas, the cattle are typically sent to feedlots, where high energy rations are fed to them in order to add flecks of fat to the animals' muscle, known as marbling; thereby improving the taste and tenderness of the beef. While in the feedlot, cattle typically gain about 3 pounds per day. One pound of gain requires approximately 7 pounds of feed. Cattle generally remain at the feedlot for between 120 and 150 days, until reaching a weight of approximately 1,200 pounds. At that point, [the cattle] are sold to a packer. (Tr. 3339-44.)

7. The standard practice in Kansas is for cattle to be delivered [to the slaughter plant] within 7 days of the sale (Tr. 134). Cattle are typically slaughtered on the same day they arrive at the plant (Tr. 3473).

8. Packers in Kansas generally purchase fed cattle using one of the following four methods: (1) live; (2) flat, in the beef; (3) grade and yield sales; or (4) forward contracts (Tr. 3458-60).

9. In live cattle sales, packers pay for cattle based on their weight while they are alive. Cattle are usually weighed at the feedlot on the day the cattle are picked up for delivery to the slaughter plant. Bids are expressed in dollars per hundredweight. (Tr. 3458.)

10. In the traditional method of selling cattle on a live basis, packer buyers visit feedlots, where they are presented with a show list identifying the pens of cattle that are for sale that week. The [packer] buyers evaluate the cattle and bid on the pens of interest. Feedlots often must call the cattle owner to determine whether the cattle will be sold at the price bid by the packer buyer. A series of telephone calls with counterproposals between the packer buyer, the feedlot, and the owner may ensue. (Tr. 132, 3746.)

11. Feedlots usually allow the first buyer who arrives at the feedlot to place the first bid. Also, a feedlot will usually sell the cattle to the first buyer to bid the price at which the cattle owner is ultimately willing to sell. For example, if every buyer bids $70 on a pen of cattle, the feedlot will sell the pen to the first buyer who bid. It is, therefore, important for the packer buyer to be the first bidder at the feedlot, and it is not uncommon for a buyer to arrive at the feedlot as early as the night before [the sale]. (Tr. 466-68, 3530, 3690-91.)

12. With flat, in the beef sales, packers pay the cattle owners based on the actual carcass weight of the animals at the packing plant after slaughter, rather than the total live weight of the animal at the feedlot (Tr. 3458). In grade and yield sales, packers pay cattle owners based on a formula that takes into account both the actual

carcass weight of the animals and the grade assigned to the carcass (Tr. 3459). A forward contract fixes the price to be paid for cattle several weeks or months in advance of the delivery date (Tr. 3459).

13. Respondent purchases cattle using all [four methods of purchase: (1) live; (2) flat, in the beef; (3) grade and yield sales; and (4) forward contracts] (Tr. 3458-60).

14. The Beef Marketing Group consists of nine feedlots in central Kansas that joined together in 1988 to develop more effective marketing methods for their cattle (Tr. 3713-14). The original Beef Marketing Group members are: Barton County Feeders, Inc.; [Carl] Dudrey Cattle Company; Golden Belt Feeders; Great Bend Feeding, Inc.; Knight Feedlot, Inc.; Mull Farms and Feeding, Inc.; Pawnee Valley Feeders, Inc.; Pratt Feeders, Inc.; and Ward Feedyard. Additional feedlots have been included based on an ownership interest of the original members. (Tr. 454.)

15. In 1990, the Beef Marketing Group entered into a marketing arrangement with Excel under which Beef Marketing Group members were entitled to sell cattle to Excel on a forward contract basis, which guaranteed Beef Marketing Group members the highest basis that Excel paid any producer for fed cattle delivered under forward contracts for the period in question. In return, Beef Marketing Group members agreed to supply Excel with a specified minimum number of cattle. (Tr. 3726-27.) Most of the cattle subject to the agreement [between the Beef Marketing Group and Excel] were Holstein cattle (Tr. 3720-21; CX 2 at 22).

16. The arrangement between the Beef Marketing Group and Excel resulted in Excel buying a substantial portion of the cattle sold by Beef Marketing Group [members]

and Beef Marketing Group [members] feeding substantially more Holsteins. Holsteins are primarily used as dairy cattle and provide lesser quality cuts of beef. Respondent has little interest in purchasing Holsteins. (Tr. 3721, 3731.)

17. In September 1993, the agreement between the Beef Marketing Group and Excel was effectively terminated (Tr. 3729-30). In January 1994, Beef Marketing Group representative, Lee Borck approached Respondent's head buyer, Bruce Bass, with a proposal for a marketing agreement (Tr. 3732). Respondent's competitors had already expressed an interest in participating in a marketing agreement with the Beef Marketing Group (Tr. 582, 618, 624, 3737). In February 1994, Respondent and the Beef Marketing Group entered into the Beef Marketing Agreement under terms essentially proposed by the Beef Marketing Group (Tr. 3733).

18. The Beef Marketing Agreement provides terms for live cattle sales which differ . . . from traditional methods for purchasing cattle in Kansas. Instead of bidding in dollars per hundredweight, bids are made using a basis that is adjusted for quality. The basis [originally] used was the highest price paid in Kansas for at least 500 . . . cattle in a given week, as reported by the United States Department of Agriculture (the Kansas practical top). Cattle which are top quality receive bids of "par" or "even," and Respondent pays the Kansas practical top price for that pen. Cattle of lesser quality receive discounted bids, for example, "minus fifty," and Respondent pays $0.50 per hundredweight less than the Kansas top price. [Respondent can bid] over the basis, for example, "plus fifty," for superior cattle, although this rarely occurs. (Tr. 3511, 3743-44.)

19. Under the Beef Marketing Agreement, bids [originally] were made on Monday and had to be accepted or rejected by Wednesday (Tr. 3513). In deciding whether to accept or reject bids, producers do not have to consider any potential changes in the market during that week. Since the bids are keyed to the Kansas practical top price for the week, producers receive the benefit of any increase in the market value during the week, but are not be affected by any decline in value. A producer, however, would still have to consider the potential for market changes from week to week. For example, a producer might opt to sell a pen of cattle either before or after the animals reach their ideal weight, if there is some indication the price will be high enough in a given week to make up for a discount on light cattle, or for the cost of feeding the cattle for an extra week.

20. The Beef Marketing Agreement also includes several non-price terms. Respondent committed to bid on every pen of cattle and is entitled to offer a separate price for each pen (Tr. 3513, 3742, 3747-48). Respondent [originally] had until Saturday of the following week to pick up the cattle, giving Respondent 3 days more than the customary period [to pick up cattle] (Tr. 3513). Respondent [originally] had a right of first refusal for all cattle on which it bid even or better (Tr. 462, 830, 1595, 3231-32, 3511-14, 3734). Respondent agreed to share slaughter information with [Beef Marketing Group members] (Tr. 3514).

21. In August 1994, the basis for bidding under the Beef Marketing Agreement was changed to the reported Kansas top price for 2,500 cattle or more. The time to accept or reject bids was moved back from Wednesday to Tuesday, and the pick up date

was moved back from Saturday to Friday. In addition, the day for buyers to look at cattle was moved back from Monday to Thursday of the prior week (Tr. 3515-16).

22. Further changes were made to the Beef Marketing Agreement in November 1995. A new grade and yield option was added. Also, for cattle sold on a live weight basis, penalties and premiums were added for cattle yielding under or over specified amounts. The right of first refusal was expanded to include pens on which Respondent bid at least the Kansas top price minus 50 cents. The basis for bidding was changed to a negotiated middle point between the Kansas top price for 2,500 cattle or more and the Kansas top price paid during the week by Respondent (in weeks when the two prices were different). (Tr. 3515-16, 3656.)

23. Two Beef Marketing Group members stopped selling . . . cattle [to Respondent] under the terms of the Beef Marketing Agreement, although they have remained members of the Beef Marketing Group (Tr. 537, 3766). Pratt Feeders, Inc., stopped selling cattle to Respondent under the terms of the Beef Marketing Agreement in February 1995 (Tr. 537). Pawnee Valley Feeders, Inc., stopped selling cattle to Respondent under the terms of the Beef Marketing Agreement in August or September 1996 (Tr. 3767).

24. Respondent has continued to purchase cattle from other Kansas feedlots under traditional methods of purchase. Other packers have continued to purchase cattle from feedlots other than those that are members of the Beef Marketing Group. Feedlots other than those that are members of the Beef Marketing Group have continued to receive competitive prices for . . . cattle after the institution of the Beef

Marketing Agreement between Respondent and the Beef Marketing Group (Tr. 3168, 3185-86, 3195-96).

25. Testimony received from owners and operators of feedlots that are not members of the Beef Marketing Group failed to show that they were harmed by the Beef Marketing Agreement. . . . [Sellers Feedlot] expanded in 1994 and 1996 (Tr. 960-61). Ottawa County Cattle Associat[es] grew from April 1994 through October 1994 (Tr. 1171). Mann's ATP, [Inc.,] purchased a neighboring feedlot expanding capacity by 6,000 cattle, and has not had any difficulty filling pens. The number of its customers has doubled since 1994. (Tr. 1228-30.) Mid-America Feedyards has grown in capacity and occupancy over the last 3 years (Tr. 1728-32).

26. The types of marketing options available at a given feedlot is a factor cattle owners consider in determining where to place cattle; however, it is not as important as other factors, such as a feedlot's reputation, cost of gain, or pen availability (Tr. 1778, 1807, 1925, 3708-11, 3932-33).

[27. Respondent's right of first refusal under the Beef Marketing Agreement provides that Respondent may obtain cattle placed in feedlots that are members of the Beef Marketing Group by matching the previous high bid, rather than by bidding a higher price than previously bid.

28. Respondent's right of first refusal allows Respondent to enter a bid, await, but not participate in, any additional bidding, and obtain cattle merely by matching any bid that may be higher than Respondent's bid.

29. Respondent's right to acquire cattle by matching the previous high bid not only has the potential of discouraging others from bidding on cattle, but also necessarily restricts competition because Respondent's right of first refusal obviates Respondent's need to bid competitively with those bidders not discouraged from bidding for cattle placed at Beef Marketing Group feedlots, in order to obtain those cattle.

30. The effect or potential effect of Respondent's right of first refusal under the Beef Marketing Agreement is to reduce competition.]

Conclusion of Law

[Respondent's right of first refusal under the Beef Marketing Agreement violates section 202 of the Packers and Stockyards Act (7 U.S.C. § 192) because it has the effect or potential effect of reducing competition.]

Discussion

A. Applicable Law.

. . . .

Complainant maintains that Respondent['s refusal to offer the terms of the Beef Marketing Agreement to all feedlots in Kansas that are similar to members of the Beef Marketing Group: (1) gives Beef Marketing Group members an undue or unreasonable preference or advantage; (2) subjects Kansas feedlots that are not members of the Beef Marketing Group to an undue or unreasonable prejudice or disadvantage; and (3)] constitutes an unfair or unjustly discriminatory practice, in violation of section 202 of the

Packers and Stockyards Act [(7 U.S.C. § 192).***] The legislative history of [the Packers and Stockyards Act establishes] that Congress intended the legislation to have a more far-reaching effect than existing antitrust statutes, such as the Sherman [Antitrust Act,] Clayton Act[, the Federal Trade Commission Act, and the Interstate Commerce Act]. *See Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962). [For example, one of the Congressional sponsors of H.R. 6320, the bill that was later enacted as the Packers and Stockyards Act, described the breadth of the bill and the scope of the Secretary of Agriculture's authority under the bill, as follows:

> Mr. Haugen. . . .
>
> It gives the Secretary complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith.
>
> The bill further coordinates the duties of the Secretary of Agriculture so that it prevents overlapping of authority and duplication of jurisdiction of the departments of Government having regulatory power which previously existed. The object sought is to preserve and hold on to all powers granted to regulate and prevent abuse and unfair practices, or, in other words, not to weaken but to strengthen existing laws.
>
> It provides for ample court review of any of the orders or regulations of the Secretary of Agriculture so as to protect the industry from any mistakes of judgment or unwarranted use of the power thus delegated.

[***The Complaint alleges that Respondent subjects similarly situated feedlots in Respondent's procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase comparable quality livestock from these feedlots under the same terms made available to the Beef Marketing Group (Compl. ¶ II(d)). While the evidence does not establish the boundaries of Respondent's procurement area, the record establishes that Respondent has procured cattle at feedlots located outside Kansas. Complainant, however, changed its position during the proceeding and asserts that Respondent subjects similarly situated feedlots in Kansas, rather than similarly situated feedlots in Respondent's procurement area, to an undue or unreasonable prejudice or disadvantage.]

> Undoubtedly it is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of the war emergency measures, and possibly the interstate commerce act.

61 Cong. Rec. 1801 (1921).

Moreover, the language of the Packers and Stockyards Act does not limit the Secretary of Agriculture's jurisdiction, as expressed by Mr. Haugen. Therefore, I find the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act includes the authority to examine agreements between packers and feedlots and to impose sanctions authorized by the Packers and Stockyards Act if such agreements result in or may potentially result in the harm which the Packers and Stockyards Act is designed to prevent.]

. . . . [Footnote 2 omitted.]

B. Complainant failed to prove the existence of $0.43 per hundredweight price difference.

The Complaint alleges that: "Respondent gives an undue or unreasonable preference to the Beef Marketing Group by guaranteeing a high price for livestock purchased from the Beef Marketing Group while refusing to make the same terms of purchase available to similarly situated sellers of comparable livestock." (Compl. ¶ II(c).) [Footnote 3 omitted.] Specifically, Complainant contends that Respondent provided Beef Marketing Group members with a price preference of $0.43 per hundredweight.[4]

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[4]Complainant also presented testimony from [operators of feedlots, which are not members of the Beef Marketing Group,] who estimated that the value of the Beef Marketing Agreement ranged from $1 to $3 per hundredweight (Tr. 772, 931, 987). These estimates were purely speculative, with no factual support . . . and were made by

(continued...)

Complainant failed to . . . prove that $0.43 per hundredweight accurately represents the price difference that . . . resulted from the Beef Marketing Agreement.

The alleged $0.43 per hundredweight preference was derived from an analysis by the Industry Analysis Staff, Packers and Stockyards Programs, which examined Respondent's transactions for a 20-week period in late 1993 and early 1994, that encompassed the 10 weeks before and the 10 weeks after the Beef Marketing Agreement went into effect.

The Industry Analysis Staff began with an examination of simple statistics surrounding the transactions. Statistics, however, only examine factors in isolation; and therefore, [do] not . . . show whether any price change was actually caused by the Beef Marketing Agreement or by some other factor. Recognizing the limited value of a purely statistical analysis, the Industry Analysis Staff developed a multiple regression model. Multiple regression is a statistical technique which can be used to examine the simultaneous effects of several factors on a single variable, if the model complies with various assumptions. Using the regression model, the Industry Analysis Staff economists concluded that the price difference attributable to the Beef Marketing Agreement was $0.43 per hundredweight. The Industry Analysis Staff model, however, suffers from a number of defects which render this conclusion unreliable.

Due to the complicated nature of the econometric study, [Complainant and Respondent] presented expert testimony to explain and analyze the study and its results.

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[4](...continued)
individuals who were not aware of all the terms of the Beef Marketing Agreement. This testimony, therefore, is of scant probative value and merits no further discussion.

Dr. Gerald Grinnell and Dr. Warren Preston, two of the economists involved in the study, testified on behalf of [Complainant]. Dr. Grinnell and Dr. Preston are both agricultural economists employed by the United States Department of Agriculture. Although both have considerable expertise in the field of agricultural economics, neither has any specialized training or expertise in the field of econometrics. [(Tr. 1961-67, 2591-95.)]

Professor Jerry Hausman testified on behalf of Respondent. Professor Hausman is a recognized expert in the field of econometrics. He is a professor at the Massachusetts Institute of Technology where he teaches econometrics. [Professor Hausman] is a former editor of the journal *Econometrica*; and he is the author of numerous publications on the subject. He developed a method of testing models for bias commonly known among econometricians as the "Hausman Specification Test." [(Tr. 3943-47.)]

According to Professor Hausman, the Industry Analysis Staff model is biased and unreliable (Tr. 3948). With non-randomized experiments, such as the one conducted by the Industry Analysis Staff, there is a critical assumption that the variable being tested is not correlated with all factors not accounted for by the developed model. The Industry Analysis Staff failed to test this assumption, and when Professor Hausman tested it, the model failed.

Professor Hausman explained that BMGAFTER (the variable of interest in the study) is a "catch-all," which would capture [not only the effect of the Beef Marketing Agreement on Beef Marketing Group prices, but also the effect of other factors not

included in the regression that impacted Beef Marketing Group prices differently in the post-Beef Marketing Agreement period than prices at feedlots that are not members of the Beef Marketing Group (RX 46 at 15)]. The Industry Analysis Study assumes that these unaccounted-for factors are not correlated with the characteristics of the transactions that are included in the model; and also that the unaccounted-for factors had the same effect on price throughout the study. Professor Hausman employed two tests[, the Hausman Specification Test and the Chow Test,] to verify these assumptions. Based on [the results of the Hausman Specification Test, Professor Hausman found that it cannot be assumed that the unaccounted-for factors are not correlated with the characteristics of the transactions that are included in the regression model. Moreover, Professor Hausman found that the assumption that the unaccounted-for factors had the same effect on price throughout the study was rejected by the Chow Test data.] Professor Hausman . . . concluded that the [Industry Analysis Staff's] regression analysis was [not scientifically valid, and no conclusion could be drawn from the regression analysis]. (RX 46 at 11-20; Tr. 3969-70, 3979.)

Complainant failed to introduce any evidence to show that its model does pass the Hausman Specification Test or the Chow Test. Instead, Complainant disputed the applicability of the Hausman Specification Test and challenged Professor Hausman's method of performing the Chow Test, as well as his interpretation of the results. The arguments made by Complainant are unpersuasive. Professor Hausman is a noted econometrician with considerable expertise in conducting these tests, particularly the Hausman Specification Test, which he developed. I found him to be a most credible

witness and have consequently afforded great weight to his analysis of the econometric study.

. . . .

Professor Hausman also pointed out that the model is not reliable in that it fails to account for non-price conditions of sale. . . . The model does include a variable to account for extended delivery when it was taken; however, no variable is included to test the value of the option of extended delivery. Failure to include important variables which are related to the variable of interest can create bias in the results (Tr. 3958). In fact, Complainant admits that any price difference resulting from [non-price conditions of sale] would appear in the $0.43 per hundredweight price difference (Complainant's Reply Brief at 16). Omission of the [option of extended delivery], therefore, calls into question the accuracy of the results, since it cannot be determined from the [Industry Analysis Staff's] regression [analysis] whether or not it was this factor that actually caused the price difference.

. . . [T]estimony of industry witnesses contradicting certain [Industry Analysis Staff] test results [is an indicator of] the inaccuracy of the Industry Analysis Staff model. The regression results suggest that whether a pen is predominantly heifer or steer has a greater effect on the price of cattle than does the per centum of the pen that grades prime or choice (Tr. 2406-11; CX 10 at 3, CX 25 at 72-73). Industry witnesses testified that the per centum of a pen grading prime or choice is an important factor in determining price and . . . that there is currently no real price distinction between steers

and heifers (Tr. 668-70, 737, 942, 1011-12, 1102, 1162, 1222-23, 1287-88, 1556-57, 1727-28).

Finally, even if the [Industry Analysis Staff] regression results were accepted as accurate for the period studied, that period cannot be found to be representative of the period covered by the Complaint. The Industry Analysis Staff model only observed the effects of the Beef Marketing Agreement for the first 10 weeks that it was in effect. Several industry witnesses testified that the market was volatile during this time period (Tr. 772, 975, 1339). Complainant introduced evidence that the market fluctuated in 10 out of the 12 weeks between February 14, 1994, and May 7, 1994 (Tr. 654-55). . . .

Complainant admits that the market was volatile in 1994 (Complainant's Proposed Findings of Fact, Conclusions and Order, Finding of Fact No. 13), but claims that such volatility was not unusual. There was no evidence introduced, however, suggesting that [the market was] volatile [in 1995 or 1996]. To the contrary, Complainant never looked at market changes during any other time period or made any attempt to discover whether the period selected for the study would provide an accurate representation of the effects of the Beef Marketing Agreement.

Complainant asserts that the study does not need to be representative of the entire time period at issue [because the econometric findings for the period studied, standing alone, are sufficient to prove a price preference (Complainant's Reply Brief at 13-14). I agree with Complainant that, if the Industry Analysis study was reliable, the study would establish that Respondent gave members of the Beef Marketing Group a price preference; however, if the 10-week period studied was more volatile than the

entire period during which the Beef Marketing Agreement was in effect, the amount of the price preference shown by the 10-week study would be higher than the actual price preference caused by the Beef Marketing Agreement during the entire period the Beef Marketing Agreement was in effect.]

The evidence does indicate that Respondent must have, on average, paid a higher price for cattle purchased under the terms of the Beef Marketing Agreement than it did on other transactions. Under the terms of the Beef Marketing Agreement, Beef Marketing Group members were able to receive the benefit of any increase in the market value of their cattle, but were not subject to any downward fluctuation of the market. . . . [T]herefore, [I find that Respondent paid, on average,] a higher price for cattle [placed] at Beef Marketing Group feedlots than [Respondent paid for cattle placed at feedlots that are not members of the Beef Marketing Group].[5] The [difference between the price Respondent paid for cattle at feedlots that are members of the Beef Marketing Group and the price Respondent paid for cattle at feedlots that are not members of the Beef Marketing Group], however, is uncertain and unproven. . . .

C. [Respondent received benefits under the Beef Marketing Agreement for its payment of higher prices for cattle.]

Although Respondent . . . paid higher prices [for cattle purchased] under the terms of the Beef Marketing Agreement [than it paid for similar cattle placed at feedlots

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[5]The conclusion that Respondent must have paid somewhat more for cattle under the Beef Marketing Agreement is also consistent with the fact that Respondent received superior non-price terms of sale under the Beef Marketing Agreement which would not likely have been offered for free. See the discussion at part C [in this Decision and Order, *infra*].

that were not members of the Beef Marketing Group], Respondent was not only paying for cattle, it was also paying for [two] bargained-for non-price conditions of sale. Respondent obtained valuable benefits under the Beef Marketing Agreement. . . .

1. Right of First Refusal

Under the Beef Marketing Agreement, Respondent initially had a right of first refusal on all cattle for which it bid even or better. Subsequently, the right was expanded to include cattle on which Respondent bid [at least] "minus 50."

Complainant asserts that Respondent did not have a right of first refusal under the Beef Marketing Agreement, citing testimony from cattle producers who fed cattle at Great Bend Feeding, Inc., and Pratt Feeders, Inc., who did not know about [Respondent's right of first refusal (Complainant's Proposed Findings of Fact, Conclusions and Order at 80-83)]. It is true that several producers were unaware that the right [of first refusal] existed; however, most of them were also unaware of the extended delivery term, the existence of which Complainant does not dispute (Tr. 1764-65, 1789-90, 1824-25, 1874, 1944-45). The former assistant feedlot manager at Great Bend Feeding, Inc., explained that he did not provide producers with all of the details of the Beef Marketing Agreement because he did not want them to be unnecessarily confused (Tr. 3913). Pratt Feeders, Inc., sold under the terms of the Beef Marketing Agreement for only 1 year[; therefore,] it is unlikely that all of its customers would be aware of every term.

Complainant also maintains that the right of first refusal did not exist because it was not enumerated in a one-page summary of terms signed by Lee Borck and Bruce

Bass (CX 2 at 2). Complainant refers to the memorandum as the "Beef Marketing Agreement," and insists that it represents the Beef Marketing Agreement in its entirety.[6] Complainant, however, cannot bypass the intent of the parties and unilaterally decide that the memorandum [is] a complete integration of the terms of the Beef Marketing Agreement.[7] Complainant did not offer any evidence to show that terms [of the Beef Marketing Agreement] are limited to those contained in the memorandum, and in fact, the evidence establishes that the Beef Marketing Agreement between the Beef Marketing Group and Respondent is intended to, and does, contain additional terms, including a right of first refusal.

Several witnesses, including those testifying for [Complainant], stated that the right of first refusal exists. Bruce Bass and Lee Borck, who negotiated the Beef Marketing Agreement, both testified that there is a right of first refusal (Tr. 3512-13, 3734). Jerry Bohn, the general manager of Pratt Feeders, Inc., testified for [Complainant] that the right of first refusal is part of the Beef Marketing Agreement and explained that a disagreement over that term caused Pratt Feeders, Inc., to stop selling under the Beef Marketing Agreement (Tr. 462[-63]). Ray Palenske, a [cattle buyer for Respondent], and Marvin Stilgenbauer[, a cattle buyer for Excel], also testified for

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[6]. . . The memorandum was not presented to Complainant as anything more than a summary of terms. When Respondent [transmitted a facsimile] of the memorandum to Complainant, it bore the notation: "Keith, This would be the *general guidelines* on how the purchases are occurring." (CX 2 at 1 (emphasis added).) . . . .

[7]*Cf. Battery Steamship Corp. v. Refineria Panama, S.A.*, [5]13 F.2d 735, 739 (2d Cir. 1975); *United States v. Clementon Sewerage Authority*, 365 F.2d 609, 613 (3d Cir. 1966); *Greenberg v. Tomlin*, 816 F. Supp. 1039, 1052 (E.D. Pa. 1993); *Monon Corp. v. Wabash Nat. Corp.*, 780 F. Supp. 577[, 582-83] (N.D. Ind. 1991).

[Complainant] that there is a right of first refusal (Tr. 830, 1595). Finally, Jay Johnson, Chief of the Packer Branch[, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration], testified as a representative of the agency that Respondent has a right of first refusal and that the right has a value. He further stated that he knew the right existed at least as early as January 1995. (Tr. 3231-32.) Assertions that the right does not exist are, therefore, inconsistent with the evidence of record.

Complainant further argues that even if the right of first refusal does exist, it is not worth any extra payment. On the contrary, the right of first refusal is quite valuable. Along with [Respondent's] commitment to make a good faith bid on every pen, [the right of first refusal] helps Respondent maintain a steady supply of high quality cattle, close to Respondent's Emporia plant. After the Beef Marketing Agreement went into effect, [Respondent's] purchases from Beef Marketing Group [members] nearly doubled, and capacity utilization at Emporia increased by 66 head per week. Increased capacity utilization translates into increased profits since labor and other fixed costs remained constant with the increase. In the first 10 weeks of the Beef Marketing Agreement, the added cattle accounted for an additional contribution of $17,609 from the slaughter division and an additional $23,765 from the processing division, for a total increase in profits of $41,374. (Tr. 3825-32; RX 8.)

The right of first refusal also allows Respondent's [cattle] buyers to be the first bidder at Beef Marketing Group [feedlots] without having to arrive at dawn, or sooner, and it eliminates repeated telephone calls and trips to the feedlots during the negotiating

process (Tr. 881-82, 3467-68). Increased efficiency certainly has value, even if it [cannot be] quantified. Complainant recognized this value in its econometric study, which hypothesizes that price would increase with the number of cattle in each lot due to increased efficiency related to purchasing larger lots (CX 25 at 54).

In the alternative, Complainant asserts that even if the right of first refusal is a valuable benefit that Respondent received from the Beef Marketing Agreement, it is anti-competitive and unlawful under the Packers and Stockyards Act, and, therefore, should not be considered. [As discussed in this Decision and Order, *infra*, I find that Respondent's right of first refusal under the Beef Marketing Agreement violates the Packers and Stockyards Act because it has the effect or potential effect of reducing competition. However, even if Respondent's right of first refusal is not considered, Respondent's right under the Beef Marketing Agreement to extended delivery is a valuable benefit which can be considered.]

2. Extended Delivery

Under the Beef Marketing Agreement, Respondent is able to delay its pick up of cattle as many as three extra days. Delivery can be scheduled as many as 10 days following the sale, instead of the customary 7 days. Complainant argues that this term does not have value because packers could sometimes get extended delivery without the Beef Marketing Agreement.

The record evidence shows that even though feedlots do, at times, give extended delivery, such extensions are not normal practice (Tr. 447, 918, 944-47, 1132-33, 1226-27, 1733-36). Ray Palenske[, a cattle buyer for Respondent,] testified that he could normally

get one extra day from a feedlot if he begged. He also testified, however, that it is "very, very, very difficult" to get more than one extra day . . . (Tr. 837). Excel [cattle] buyer, Robert Albrecht, testified that feedlots would give him an extra day approximately 50 percent of the time that he asked for one (Tr. 1633). The record further shows that some feedlots are particularly resistant to the practice of extending delivery. Kenneth Wiens, of Central Feeders, for example, testified that, although he sometimes gives extra days, he "frowns on" the practice, and he has some customers who never allow extra time (Tr. 739-40). Allen Sents, of McPherson County Feeders, testified that he tries to avoid giving extended delivery (Tr. 970). Wend[e]ll Zimmerman, of Zimm's Feedlot, testified that he "very seldom" allows delivery beyond 7 days (Tr. 1077-78). Lowell Sawyer, of O.K. Corral, testified that he is opposed to giving extended delivery terms and will only allow it "very occasionally" (Tr. 1289-90). None of the feedlot operators testified that they would guarantee 10-day delivery on all sales, for free.

There is a difference between being able to obtain extended delivery sometimes and having the right to take extra days on any transaction, for any reason. This difference is of economic value to Respondent.

The availability of extra days benefitted Respondent by allowing greater flexibility in scheduling delivery of cattle for slaughter. [Respondent slaughters] approximately 4,000 [cattle] each day [at its Emporia plant], and the cattle are generally slaughtered on the same day they arrive at the plant (Tr. 3474). The scale house coordinator must schedule daily shipments in a way which accommodates Respondent's inventory without overburdening the plant. Having three extra days [during which cattle shipments can be

scheduled] helps to ease scheduling pressures, while enabling Respondent to maximize its inventory.

Also, it is unlikely that feedlots would grant three extra days as a matter of right without some compensation for the cost of feeding the animals those additional days. Steve Sellers, of Sellers Feedlot, testified that after 7 days it can cost $0.50 per hundredweight or more to feed an animal for a single day [(Tr. 945-47). Lowell Sawyer, of the O.K. Corral, testified that later in the feeding cycle the cost of gain is higher than the cost of gain earlier in the feeding cycle and one would lose money by having to feed cattle extra days, even taking into account the extra weight gained by the cattle] (Tr. 1308-09). Jerry Anderson, of Mid-America Feedyards, testified that a 10-day delivery period could cost as much as $5 per hundredweight more than a 7-day delivery period (Tr. 1736). Furthermore, the cattle owner bears the risk of any type loss, which would include death, injury, or weight loss, during the extra days. In high risk situations, such as when a storm is forecast, an owner would likely deny extended delivery terms under a regular sale, but would be unable to refuse . . . Respondent [extended delivery of cattle placed at Beef Marketing Group feedlots]. (Tr. 1013-14.) Due to the extra risk and cost to the feedlots, it is to be expected that they would impose a compensatory charge. Complainant's econometric study recognizes this fact: "Feedlot managers are reluctant to hold cattle beyond the standard delivery period since delayed delivery increases costs to the feedlot. Thus, we expected that feedlots would demand additional compensation to hold cattle for extended delivery and IBP, inc. would incur higher costs of cattle." (CX 25 at 58.)

Complainant also argues that extended delivery is not worth $0.43 because it is rarely used. This argument fails for two reasons. First, an option has value whether exercised or not. Second, the option was exercised. Complainant's expert witness, Dr. Gerald Grinnell, testified that Respondent took delivery from Beef Marketing Group members after 7 days more than 50 percent of the time (Tr. 2077-78). Complainant's statistical analysis further shows that the average number of days between the sale and delivery of cattle from Beef Marketing Group feedlots increased by almost 2 days after initiation of the Beef Marketing Agreement (CX 9 at 131). [Moreover, even if Complainant's assertion that Respondent's right of extended delivery is not worth $0.43 per hundredweight is correct, Complainant did not prove that Respondent paid $0.43 per hundredweight more for cattle placed at Beef Marketing Group feedlots than for similar cattle placed at similar feedlots in Kansas that are not members of the Beef Marketing Group.]

3. Pen-by-Pen Bidding

Respondent also advances the Beef Marketing Agreement provision for pen-by-pen bidding as a valuable right. Although it is possible that this term may have some value to Respondent, such value is not unequivocally established by the record. Although feedlots may have traditionally tied lesser quality pens of cattle to higher quality pens, it appears that currently, in Kansas, pen-by-pen bidding is consistently available without the Beef Marketing Agreement. In any case, it is not necessary for the potential value of the pen-by-pen bidding term to be established, since the . . . extended delivery term is sufficient to account for [Respondent's payment of a higher price for

cattle placed at Beef Marketing Group feedlots than it paid for similar cattle placed at similarly situated feedlots in Kansas that are not members of the Beef Marketing Group].

D. Complainant failed to prove that Respondent provided a preference which was *undue* or *unreasonable*.

[Although] Complainant ha[s] proven that Respondent afforded the Beef Marketing Group members a preference . . . in the form of a . . . price advantage, Complainant failed to prove that such a preference [is] "undue" or "unreasonable."

The [Packers and Stockyards] Act does not specify what constitutes "undue" or "unreasonable," instead those terms must be defined according to the facts of each case. *See Capitol Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir. 1965). The facts of this case do not conclusively establish that [Respondent's payment of a higher price for cattle placed at Beef Marketing Group feedlots, than Respondent pays for similar cattle placed at feedlots that are not members of the Beef Marketing Group, is] . . . "undue" or "unreasonable."

The $0.43 per hundredweight price advantage [which Complainant asserts Respondent paid for cattle at Beef Marketing Group feedlots] on a typical 1,200-pound animal would amount to approximately $5 per head. At the time of the econometric study, Respondent's average live cost for cattle was approximately $75 per hundredweight (CX 12 at 58), or $900 for a typical 1,200-pound animal. Consequently, a $0.43 per hundredweight difference represented only about one-half of one percent of the purchase price of a typical animal.

Complainant asserts that $0.43 per hundredweight is undue or unreasonable because it is significant in comparison to producer profits and bidding increments. Some witnesses testified that on average, in 1994, they suffered losses on their cattle ranging from $1.50 to $8 per hundredweight (Tr. 556-57, 1000, 1085, 1194). [T]estimony [was also given] that, although bids in Kansas are currently made in increments of $1 per hundredweight, in 1994, increments of $0.50 per hundredweight were more common and sometimes bids [were in increments of] as little as $0.10 per hundredweight (Tr. . . . 916-17, 968-69, 1083, 1260).

On the other hand, the cost of gain at feedlots can vary as much as $15 to $30 per hundredweight (Tr. 3709-11). In comparison, it is questionable whether a difference of $0.43 per hundredweight would significantly affect either [producer] profits or placement of cattle by producers. This conclusion is supported by testimony from producers which indicates that the Beef Marketing Agreement had little if any impact on any of their decisions on where to place cattle, as well as by the fact that Pratt Feed[ers, Inc.,] and Pawnee Valley Feeders[, Inc.,] withdrew from the Beef Marketing Agreement, while remaining members of the Beef Marketing Group. Whatever price advantage the Beef Marketing Agreement afforded, it was not sufficient to induce [Pratt Feeders, Inc., and Pawnee Valley Feeders, Inc.,] to continue under its terms.

. . . .

E. Respondent['s failure to offer terms of the Beef Marketing Agreement to all feedlots in Kansas does not violate the Packers and Stockyards Act].

Complainant alleges that Respondent [subjects similarly situated feedlots in Kansas to an undue or unreasonable prejudice or disadvantage,] in violation of section 202[(b) of the Packers and Stockyards Act], by failing to offer the terms of the Beef Marketing Agreement to all feedlots in Kansas [that are similar to the feedlots that are members of the Beef Marketing Group].[8] . . . In *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995), the United States Court of Appeals for the Eighth Circuit held:

> [The agency's] claim, in essence, is that § 202 of the PSA . . . statutorily creates an entitlement to obtain the same type of contract that Swift Eckrich may have offered to other independent growers. We are convinced that the purpose behind § 202 of the PSA . . . was not to so upset the traditional principles of freedom of contract. The PSA was designed to promote efficiency, not frustrate it.

Id. at 1458. *See also Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 202 (E.D.N.C. 1996).

Consequently, it is not enough for Complainant to show that Respondent buys cattle [placed at Beef Marketing Group members] using different methods and different terms of sale [than it uses at feedlots that are not members of the Beef Marketing Group]. In order to show a violation of the Packers and Stockyards Act, Complainant is required to prove that [Respondent's failure to offer the terms of] the Beef Marketing Agreement [to all similarly situated feedlots in Kansas] causes the kind of harm that the Packers and Stockyards Act is designed to prevent. This distinction was explained nearly 60 years ago:

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[8]See note ***.

> Differences or variations in prices, or in the terms of credit, or amounts of discount, or in practices do not come within the ban of the [Packers and Stockyards A]ct unless they in fact constitute engaging in or using an unfair or unjustly discriminatory or deceptive practice or device in commerce or unless they constitute a making or giving, in commerce, of an undue or unreasonable preference or advantage, or result in undue or unreasonable prejudice or disadvantage as between persons or localities.

Swift & Co. v. Wallace, 105 F.2d 848, 853 (7th Cir. 1939). In *Armour & Co.*, the court stated again that price differences are not illegal, absent anti-competitive intent, quoting the following passage from a United States Court of Appeals for the Seventh Circuit anti-trust decision:

> "[T]he object of the anti-trust law is to encourage competition. Lawful price differentiation is a legitimate means for achieving the result. It becomes illegal only when it is tainted by the purpose of unreasonably restraining trade or commerce or attempting to destroy competition or a competitor, thus substantially lessening competition, or when it is so unreasonable as to be condemned as a means of competition. The price reduction here has none of these stigmata."

Armour & Co. v. United States, 402 F.2d 712, 720 (7th Cir. 1968) (citing *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, 807 (S.D. Cal. 1952)), *aff'd*, 231 F.2d 356 (9th Cir.), *cert. denied*, 350 U.S. 991 (1955). *See also Central Coast Meats, Inc. v. United States Dep't of Agric.*, 541 F.2d 1325, 1327 (9th Cir. 1976). [While I find that Respondent's right of first refusal under the Beef Marketing Agreement violates the Packers and Stockyards Act because it has the effect or potential effect of reducing competition, I do not find that Respondent's failure to offer the same terms to all similarly situated feedlots in Kansas constitutes a violation of section 202 of the Packers and Stockyards Act.]

F. Complainant failed to prove that the Beef Marketing Agreement caused [injury to competitors].

In addressing the type of harm which must be shown under section 202 of the Packers and Stockyards Act, courts have disagreed on whether there is a requirement that there be an injury to competition, or whether injury to competitors is enough. Some cases have held that because the Packers and Stockyards Act is broader than general antitrust law, that injury to competitors is sufficient. *See Swift & Co. v. United States*, 393 F.2d 247[, 253] (7th Cir. 1968); *Wilson & Co. v. Benson*, 286 F.2d 891[, 895] (7th Cir. 1961). [Other cases,] however, . . . have focused on whether there was actual or likely injury to competition. *See, e.g., Farrow v. United States Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985); *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968); *Aikins v. United States*, [282 F.2d 53] (10th Cir. 1960); *Berigan v. United States*, 257 F.2d 852 (8th Cir. 1958); *Swift & Co. v. Wallace*, 105 F.2d 848 (7th Cir. 1939).

[I find that harm to competition can be proven by showing harm to competitors and that the Packers and Stockyards Act does not require that the person harmed be a direct competitor of the person causing the harm, *viz.*, it would be a violation of the Packers and Stockyards Act if it were shown that a packer caused harm, which the Packers and Stockyards Act is designed to prevent, to a feedlot or a livestock producer. However, Complainant failed to prove that Respondent's failure to offer the terms of the Beef Marketing Agreement to feedlots in Kansas that are not members of the Beef Marketing Group injured those feedlots or the cattle producers who placed cattle at those feedlots.]

Central Feeders, Ottawa County Cattle Associat[es], Mann's ATP, [Inc.,] and Mid-America Feedyards all expanded after the Beef Marketing Agreement between the Beef Marketing Group and Respondent went into effect. Although some feedlot operators suspected that they lost some business as a result of the Beef Marketing Agreement, there is no evidence to substantiate these suspicions (Tr. 987, 1197-98, 1266-67, 1348). To the contrary, the testimony from producers indicates that membership in the Beef Marketing Group was not of particular concern to them in making cattle placement decisions.

Kim Goracke testified that, when selecting a feedlot, he relies primarily on the recommendations of his nutritionist and that he feeds at Pratt [Feeders, Inc.,] even though the terms of the Beef Marketing Agreement are no longer available there (Tr. 1750, 1763). Lynn Rock testified that he was not concerned enough about the Beef Marketing Agreement to ask a feedlot whether it was a Beef Marketing Group member before placing cattle there. He further testified that although he would rather [place cattle with] a Beef Marketing Group member than [with] a [feedlot that was not a] Beef Marketing Group [member] if all else were equal, all else is not equal among feedlots. (Tr. 1803.) Lynn Kauffman testified that the Beef Marketing Agreement has not affected his placement decisions in the last several years and that although he sold to Pratt [Feeders, Inc.,] under the terms of the Beef Marketing Agreement in 1994, he continued to sell at Pratt [Feeders, Inc.,] after the Beef Marketing Agreement was no longer available (Tr. 1814.) When deciding where to place cattle, Mr. Kauffman testified that he considers pen availability, cost of gain, feed supply, general appearance of the

feedlot, and trust and friendship with the feedlot operators (Tr. 1817-22). Walter Krier testified that he places his cattle based on friendship and loyalty and who does the best job with feeding and marketing (Tr. 1860-61). Ralph Hembree testified that he decides where to place cattle based on recommendations from other people in the cattle business, such as feed salesmen. Mr. Hembree was not sure whether or not all of the feedlots where he fed his cattle were Beef Marketing Group members. (Tr. 1921, 1938-39.)

Furthermore, Complainant admits that [feedlots that are not members of] the Beef Marketing Group continue to receive competitive prices despite the Beef Marketing Agreement (Complainant's Reply Brief at 68). Jerry Bohn, the general manager of Pratt Feeders, [Inc.,] testified that he continued to receive the best price available each week after withdrawing from the Beef Marketing Agreement (Tr. 540). In fact, [Mr. Bohn] stated that Pratt [Feeders, Inc.,] benefitted from the existence of the Beef Marketing Agreement after it withdrew, because there was greater interest from Respondent's competitors (Tr. 539).

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises seven issues in Agency's Appeal Petition and Brief [hereinafter Complainant's Appeal Petition].

First, Complainant contends that the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to regulate the manner in which packers

conduct business, including livestock procurement methods, such as Respondent's use of the Beef Marketing Agreement (Complainant's Appeal Pet. at 7-10).

I agree with Complainant. The Packers and Stockyards Act was described by its sponsors as one of the most comprehensive regulatory measures ever enacted.[9] Similarly, the House Report applicable to the bill that was later enacted as the Packers and Stockyards Act (H.R. 6230), states, as follows:

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

H.R. Rep. No. 67-77, at 2 (1921).

The Conference Report applicable to H.R. 6230 states that "Congress intends to exercise, in the bill, the fullest control of packers and stockyards which the Constitution permits[.]" H.R. Conf. Rep. No. 67-324, at 3 (1921).

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[9]61 Cong. Rec. 1801 (1921) (By Mr. Haugen: "Undoubtedly it is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of war emergency measures, and possibly the interstate commerce act."); 61 Cong. Rec. 4783 (1921) (By Mr. Haugen: "It gives the Secretary of Agriculture complete visitorial, inquisitorial, supervisory, and regulatory power over the packers and stockyards. It extends over every ramification of the packers and stockyard transactions in connection with the packing business. It provides for ample court review. The bill is designed to supervise and regulate and thus safeguard the public and all elements of the packing industry, from the producer to the consumer, without injury or to destroy any unit in it. It is the most far-reaching measure and extends further than any previous law into the regulation of private business—with few exceptions, the war emergency measure and possibly the interstate commerce act.").

Further, Congress has repeatedly broadened the Secretary of Agriculture's authority under the Packers and Stockyards Act.[10] The primary purpose of the Packers and Stockyards Act was described in a House Report, in connection with a major amendment of the Packers and Stockyards Act enacted in 1958, as follows:

> The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries

[10]For example, in 1924, the Packers and Stockyards Act was broadened to authorize the Secretary of Agriculture to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460 (codified at 7 U.S.C. § 204)). The Packers and Stockyards Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649 (codified at 7 U.S.C. §§ 192, 218b, 221, 223)). In 1958, the Packers and Stockyards Act was broadened to give the Secretary of Agriculture "jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size" (H.R. Rep. No. 85-1048, at 5 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5216). In 1976, the Packers and Stockyards Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary of Agriculture prove that each violation occurred "in commerce" (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

> from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.[11]

H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5213.

Courts that have examined the Packers and Stockyards Act have uniformly described the Act as constituting a broader grant of authority to regulate than previous legislation.[12] Moreover, the Packers and Stockyards Act is remedial legislation and should be liberally construed to effectuate its purposes,[13] and its purposes have been

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[11]*Accord In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121, 1130-31 (1996); *In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1056-57 (1990); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988); *In re Gary Chastain*, 47 Agric. Dec. 395, 420 (1988), *aff'd per curiam*, 860 F.2d 1086 (8th Cir. 1988) (unpublished), *printed in* 47 Agric. Dec. 1395 (1988); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 299 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 233-34 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); Donald A. Campbell, The Packers and Stockyards Act Regulatory Program, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1989 Cum. Supp.)

[12]*See, e.g., Swift & Co. v. United States*, 393 F.2d 246, 253 (7th Cir. 1968) (stating that the statutory prohibitions of section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Antitrust Act or even section 5 of the Federal Trade Commission Act); *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) (stating that the legislative history shows that Congress understood that section 202 of the Packers and Stockyards Act is broader in scope than antecedent legislation, such as the Sherman Antitrust Act, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act, and section 3 of the Interstate Commerce Act); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) (stating that from the legislative history it is a fair inference that, in the opinion of Congress, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act and the prohibitions in the Sherman Antitrust Act were not broad enough to the meet the public needs as to business practices of packers; section 202(a) and (b) of the Packers and Stockyards Act was enacted for the purpose of going further than prior legislation in the prohibiting of certain trade practices which Congress considered were not consonant with the public interest).

[13]*Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985); *Rice v. Wilcox*, 630 F.2d 586, 589 (8th Cir. 1980); *Travelers Indem. Co. v. Manley Cattle Co.*, 553

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variously described.[14] Therefore, I find that Respondent's use of the Beef Marketing

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[13](...continued)
F.2d 943, 945 (5th Cir. 1977); *Central Coast Meats v. United States Dep't of Agric.*, 541 F.2d 1325, 1328 (9th Cir. 1976); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1336 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966); *Lich v. Cornhusker Casualty Co.*, 774 F. Supp. 1216, 1221 (D. Neb. 1991); *Cook v. Hartford Accident & Indem, Co.*, 657 F. Supp. 762, 767 (D. Neb. 1987) (memorandum opinion); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1470 (N.D.N.Y. 1984) (memorandum decision); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion); *In re Frosty Morn Meats, Inc.*, 7 B.R. 988, 1013 (M.D. Tenn. 1980); *Arnold Livestock Sales Co. v. Pearson*, 383 F. Supp. 1319, 1323 (D. Neb. 1974) (memorandum opinion); *Folsom-Third Street Meat Co. v. Freeman*, 307 F. Supp. 222, 225 (N.D. Cal. 1969); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121, 1132 (1996); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748, 799 (1985).

[14]*See Mahon v. Stowers*, 416 U.S. 100, 106 (1974) (per curiam) (stating that the chief evil at which the Packers and Stockyards Act is aimed is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells and unduly and arbitrarily to increase the price to the consumer who buys); *Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass'n*, 356 U.S. 282, 289 (1958) (stating that the Packers and Stockyards Act is aimed at all monopoly practices, of which discrimination is one); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1460 (8th Cir. 1995) (stating that the Packers and Stockyards Act has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (stating that the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to deal with any practices that inhibit the fair trading of livestock by stockyards, marketing agencies, and dealers); *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (stating that one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating that one purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock); *Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 718 (10th Cir. 1977) (stating that one purpose of the Packers and Stockyards Act is to make sure that farmers and ranchers receive true market value for their livestock and to protect consumers from unfair practices in the marketing of meat
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products); *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369 (7th Cir. 1976) (stating that the Packers and Stockyards Act is a statute prohibiting a variety of unfair business practices which adversely affect competition); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974) (stating that the chief evil sought to be prevented or corrected by the Packers and Stockyards Act is monopolistic practices in the livestock industry); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972) (stating that the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971) (stating that the purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats and other products); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) (stating that the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers); *United States Fidelity & Guaranty Co. v. Quinn Brothers of Jackson, Inc.*, 384 F.2d 241, 245 (5th Cir. 1967) (stating that one of the basic objectives of the Packers and Stockyards Act is to impose upon stockyards the nature of public utilities, including the protection for the consuming public that inheres in the nature of a public utility); *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 956 (D.C. Cir. 1966) (stating that the purpose of the Packers and Stockyards Act is to prevent economic harm to the growers and consumers through the concentration in a few hands of the economic function of the middle man); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating that one of the purposes of the Packers and Stockyards Act is to ensure proper handling of shipper's funds and their proper transmission to the shipper); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932) (stating that one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 200 (E.D.N.C. 1996) (stating that the Packers and Stockyards Act was enacted to regulate the business of packers by forbidding them from engaging in unfair, discriminatory, or deceptive practices in interstate commerce, subjecting any person to unreasonable prejudice therein, or doing any of a number of acts to control prices or establish a monopoly in the business); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion) (stating that one purpose of the Packers and Stockyards Act is to give all possible protection to suppliers of livestock); *United States v. Hulings*, 484 F. Supp. 562, 567 (D. Kan. 1980) (memorandum opinion) (stating that one purpose of the Packers and Stockyards Act is to protect farmers and ranchers from

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[14](...continued)
receiving less than fair market value for their livestock and to protect consumers from unfair practices); *Guenther v. Morehead*, 272 F. Supp. 721, 725-26 (S.D. Iowa 1967) (stating that the thrust of the Packers and Stockyards Act is in the direction of stemming monopolistic tendencies in business; the unrestricted free flow of livestock is to be preserved by the elimination of certain unjust and deceptive practices disruptive to such traffic; the Packers and Stockyards Act deals with undesirable modes of business conduct by livestock concerns which are made possible by the disproportionate bargaining position of such businesses); *De Vries v. Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn. 1951) (stating that the Packers and Stockyards Act was passed for the purposes of eliminating evils that had developed in marketing livestock in the public stockyards of the nation; controlling prices to prevent monopoly; eliminating unfair, discriminatory, and deceptive practices in the meat industry; and regulating rates for services rendered in connection with livestock sales), *aff'd*, 199 F.2d 677 (8th Cir. 1952), *cert. denied*, 344 U.S. 934 (1953); *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95 (D. Minn. 1945) (stating that by the Packers and Stockyards Act, Congress sought to eliminate the unfair and monopolistic practices that existed; one of the chief objectives of the Packers and Stockyards Act is to stop collusion of packers and market agencies; Congress made an effort to provide a market where farmers could sell livestock and where they could obtain actual value as determined by prices established at competitive bidding); *Bowles v. Albert Glauser, Inc.*, 61 F. Supp. 428, 429 (E.D. Mo. 1945) (stating that government supervision of public stockyards has for one of its purposes the maintenance of open and free competition among buyers, aided by sellers' representatives); *In re Petersen*, 51 B.R. 486, 488 (Bankr. D. Kan. 1985) (memorandum opinion) (stating that one purpose of the Packers and Stockyards Act is to ensure proper handling of shippers' funds and their proper transmission to shippers); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 B.R. 781, 793 (Bankr. E.D. Ark. 1984) (memorandum opinion) (stating that one of the primary purposes of the Packers and Stockyards Act and its regulations is to protect the welfare of the public by assuring that the sellers and buyers who are customers of the market agencies and dealers are not victims of unfair trade practices); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990) (stating that the primary objective of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true value of their livestock); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988) (stating that the primary purpose of the Packers and Stockyards Act is to assure not only fair competition, but also, fair trade practices in livestock marketing and meat packing); Harold M. Carter, The Packers and Stockyards Act, 10 Harl, *Agricultural Law* § 71.05 (1983) (stating that among the more important purposes of the Packers and Stockyards Act are to prohibit particular circumstances which might result in a monopoly and to induce healthy competition; prevent potential injury by stopping unlawful practices in their incipiency; prevent economic harm to livestock and poultry producers and consumers and to protect them against certain deleterious practices of
(continued...)

Agreement is well within the jurisdiction of the Secretary of Agriculture to regulate or prohibit under the Packers and Stockyards Act and that if Respondent's use of the Beef Marketing Agreement causes any harm, which the Packers and Stockyards Act is designed to prevent, even if that harm is not to Respondent's direct competitors, the Secretary may impose against Respondent any of the sanctions provided under the Packers and Stockyards Act.

Second, Complainant contends that the Judicial Officer is not bound by credibility, legal, or factual determinations made by the Chief ALJ (Complainant's Appeal Pet. at 10-11).

I agree with Complainant that the Judicial Officer is not bound by the Chief ALJ's credibility, legal, or factual determinations, and the Judicial Officer must make his own independent findings. The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

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[14](...continued)
middlemen; assure fair trade practices in order to safeguard livestock producers against receiving less than the true value of livestock as well as to protect consumers against unfair meat marketing practices; insure proper handling of funds due sellers for the sale of their livestock; and assure reasonable rates and charges by stockyard owners and market agencies in connection with the sale of livestock; and assure free and unburdened flow of livestock through the marketing system unencumbered by monopoly or other unfair, unjustly discriminatory, or deceptive practices).

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

. . . .

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

The consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[15]

The Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved;[16] (2) the record is sufficiently strong to compel a reversal as to the facts;[17] or (3) an administrative law judge's

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[15]*In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. ___, slip op. at 68-69 (Mar. 2, 1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

[16]*In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

[17]*In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

findings of fact are hopelessly incredible.[18] Moreover, the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[19]

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[18]*Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986).

[19]*See also In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. ___, slip op. at 67 (Mar. 2, 1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating that the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating that agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis*

(continued...)

While I disagree with the Chief ALJ's conclusion that Respondent did not violate the Packers and Stockyards Act, I agree with most of the Chief ALJ's findings of fact and discussion and the Chief ALJ's credibility determinations. Therefore, except with respect to the Chief ALJ's conclusion and order and the other minor changes noted in this Decision and Order, *supra*, I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order in this proceeding.

Third, Complainant contends that the Chief ALJ erroneously refused to consider evidence that multiple regression analyses using a pricing model for fed cattle are routinely utilized (Complainant's Appeal Pet. at 50). Even if I were to find that the Chief ALJ erred by refusing to consider evidence regarding the frequency of the utilization of multiple regression analyses using pricing models for fed cattle, I would find that the error is harmless. The Chief ALJ based his conclusion that Complainant failed to prove that Respondent gives Beef Marketing Group feedlots a $0.43 per hundredweight price preference on his finding that the Industry Analysis Staff's multiple regression model is unreliable. Even if the Chief ALJ had found that multiple regression

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[19](...continued)
v. Secretary of Health and Human Services, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating that while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating that the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating that the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating that the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

analyses using a pricing model for fed cattle are routinely utilized, it does not appear that such a finding would alter the Chief ALJ's conclusion that Complainant failed to prove that Respondent gives Beef Marketing Group feedlots a $0.43 per hundredweight price preference.

Fourth, Complainant contends that the Chief ALJ erroneously excluded non-price preferences from consideration based on the Chief ALJ's ruling that Complainant did not allege in the Complaint that Respondent's making non-price preferences available only to members of the Beef Marketing Group violated the Packers and Stockyards Act (Complainant's Appeal Pet. at 62-65).

I agree with Complainant that the Chief ALJ's exclusion of non-price preferences from consideration, based on the Chief ALJ's finding that the non-price preferences are not alleged in the Complaint to be in violation of the Packers and Stockyards Act, is error.

The Administrative Procedure Act provides that notice of matters of fact and law asserted must be provided to those entitled to notice of an agency hearing, as follows:

> **§ 554. Adjudications**
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> . . . .
>
> (b) Persons entitled to notice of an agency hearing shall be timely informed of—
> (1) the time, place, and nature of the hearing;
> (2) the legal authority and jurisdiction under which the hearing is to be held; and
> (3) *the matters of fact and law asserted.*

5 U.S.C. § 554(b) (emphasis added).

Similarly, the Rules of Practice require that allegations of fact and provisions of law that form a basis for the proceeding must be included in a complaint, as follows:

> **§ 1.132 Definitions.**
>
> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
>
> . . . .
>
> *Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.
>
> . . . .
>
> **§ 1.133 Institution of proceedings.**
>
> . . . .
>
> (b) *Filing of complaint.* (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or any regulation, standard, instruction or order issued pursuant thereto, whether based on information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.
>
> . . . .
>
> **§ 1.135 Contents of complaint.**
>
> A complaint filed pursuant to § 1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, *the allegations of fact and provisions of law which constitute a basis for the proceeding*, and the nature of the relief sought.

7 C.F.R. §§ 1.132, .133(b)(1), .135 (1996) (emphasis added).

It is well settled that the formalities of court pleading are not applicable in administrative proceedings.[20] It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the absence of a showing that some party was misled.[21] Therefore, in order to comply with the Administrative Procedure

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[20]*Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940); *NLRB v. Int'l Bros. of Elec. Workers, Local Union 112*, 827 F.2d 530, 534 (9th Cir. 1987); *Citizens State Bank of Marshfield v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

[21]*NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Rapp v. United States Dep't of Treasury*, 52 F.3d 1510, 1519-20 (10th Cir. 1995); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. United States Dep't. Agric.*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Marilyn Shepherd*, 57 Agric. Dec. ___, slip op. at 45 (June 26, 1998); *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 15 (May 13, 1998) (Order Denying Pet. for Recons.); *In re Tammi Longhi*, 56 Agric. Dec. 1373, 1387-89 (1997), *appeal docketed*, No. 97-3897 (6th Cir. Aug. 12, 1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1323 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 200 n.9 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 132 (1996); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1097-98 (1994); *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53 (b)(2)); *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990); *In re Floyd Stanley White*,

(continued...)

Act and the Rules of Practice, the Complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and in order to comply with the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the Complaint must apprise Respondent of the issues in controversy.

The Complaint alleges that:

II

(a) Respondent, IBP, inc., beginning in February 1994, and continuing through to the present, purchases livestock from a group of feedlots located in Kansas, hereinafter referred to as the "Beef Marketing Group", pursuant to an exclusive marketing agreement, hereinafter referred to as "Beef Marketing Agreement" or "BMA". Beginning on or about February 7, 1994, and ending on or about August 31, 1994, respondent guaranteed the "Kansas Practical Top" price, adjusted to reflect the quality of the purchased livestock, for all livestock purchased on a live weight basis from the Beef Marketing Group. Beginning on or about September 1, 1994, and continuing through to the present, respondent guarantees the average of the "Kansas Practical Top" price and respondent's top price, adjusted to reflect the quality of the purchased livestock, for all livestock purchased on a live weight basis from the Beef Marketing Group.

(b) Other feedlots have approached respondent seeking to sell livestock under the same terms available to the Beef Marketing Group. Although these feedlots are similarly situated to the feedlots of the Beef Marketing Group and sell comparable quality livestock, respondent has refused to make the BMA terms of purchase available to them.

(c) Respondent gives an undue or unreasonable preference to the Beef Marketing Group by guaranteeing a high price for livestock

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[21](...continued)
47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233-32 (1987); *In re H & J Brokerage*, 45 Agric. Dec. 1154, 1197-98 (1986); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1434 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (Ruling on Certified Questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

> purchased from the Beef Marketing Group while refusing to make the same terms of purchase available to similarly situated sellers of comparable livestock.
>
> (d) Respondent subjects similarly situated feedlots in its procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase comparable quality livestock from these feedlots under the same terms made available to the Beef Marketing Group.
>
> III
>
> By reason of the facts alleged in paragraph II herein, respondent, IBP, inc., has violated sections 202(a) and (b) of the Act (7 U.S.C. §§ 192 (a),(b)).

Compl. ¶¶ II, III (footnote omitted).

I find the Complaint apprises Respondent that all of the terms of the Beef Marketing Agreement are at issue in the proceeding and that the Chief ALJ erred by failing to consider every preference and advantage Respondent gives to Beef Marketing Group members and their producer customers and every prejudice and disadvantage to which Respondent subjects other similarly situated feedlots and their producer customers.

Fifth, Complainant contends that Respondent's use of the Beef Marketing Agreement is a discriminatory practice and that Respondent's use of the Beef Marketing Agreement gives a preference or advantage to the Beef Marketing Group and subjects similarly situated feedlots in Kansas to a prejudice or disadvantage (Complainant's Appeal Pet. at 12-65).

I agree with Complainant. The Packers and Stockyards Act does not define the word *discriminatory* as used in section 202(a) or the terms *preference or advantage* and *prejudice or disadvantage* as used in section 202(b). When not defined by the statute,

words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted.[22]

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[22]*See Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) (stating that in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning); *Smith v. United States*, 508 U.S. 223, 228 (1993) (stating that when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (stating that courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (stating that in cases of statutory construction, we begin with the language of the statute; unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (stating that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 (1968) (stating that in the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (stating that words of statutes should be interpreted where possible in their ordinary, everyday senses); *United States v. Stewart*, 311 U.S. 60, 63 (1940) (stating that Congress will be presumed to have used a word in its usual and well-settled sense); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (stating that in construing the words of an act of Congress, we seek the legislative intent; we give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation); *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 560 (1932) (stating that the legislature must be presumed to use words in their known and ordinary signification); *De Ganay v. Lederer*, 250 U.S. 376, 381 (1919) (stating that unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributed to them); *Greenleaf v. Goodrich*, 101 U.S. 278, 285 (1879) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws); *Maillard v. Lawrence*, 16 How. 251, 261 (1853) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws; and whenever the legislature enacts a law, the just conclusion from such a course must be that the legislators not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom

(continued...)

While the word *discriminatory* varies depending on the context in which it is used, the common meaning of the word *discriminatory* includes "applying or favoring discrimination in treatment" (Webster's Collegiate Dictionary 332 (10th ed. 1997)) and the common meaning of the word *discrimination* means "a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored" (Black's Law Dictionary 467 (6th ed. 1990)).[23] I find that, under section

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[22](...continued)
the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large); *Levy v. McCartee*, 6 Pet. 102, 110 (1832) (stating that the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context); *Minor v. The Mechanics' Bank of Alexandria*, 1 Pet. 46, 64 (1828) (stating that the ordinary meaning of the language of a statute must be presumed to be intended, unless it would manifestly defeat the object of the provisions). *See also In re The Lubrizol Corp.*, 51 Agric. Dec. 1198, 1205 (1992) (stating that the term *used* is not defined in the Plant Variety Protection Act; therefore, it must be accorded its ordinary, dictionary meaning).

[23]*See also United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co.*, 931 F.2d 744, 751 (11th Cir. 1991) (stating that *discrimination* may be defined as a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored); *Richmond, Fredericksburg & Potomac R.R. v. Department of Taxation*, 762 F.2d 375, 380 n.4 (4th Cir. 1985) (stating that in essence, *discrimination* is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored); *Hocking Valley Ry. v. United States*, 210 F. 735, 740 (6th Cir.) (stating that *discrimination* in ordinary understanding and definition is the act of treating differently; it is the antithesis of advantage; one who enjoys an advantage over another at the hands of one with whom he has common dealing has his fellow within a corresponding discrimination), *cert. denied*, 234 U.S. 757 (1914); *Baker v. California Land Title Co.*, 349 F. Supp. 235, 238 (C.D. Cal. 1972) (stating that *discrimination* is a term well understood in the law; it is, in general, a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored), *aff'd*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *In re Grievance of Towle*, 665 A.2d 55, 60 (Vt. 1995) (stating, with respect to state employee disciplinary proceedings, we have defined *discrimination* as the unequal treatment of individuals in the same circumstances).

202(a) of the Packers and Stockyards Act, treating similar entities differently is a discriminatory practice.

Webster's Collegiate Dictionary defines the word *preference* as "the act, fact, or principle of giving advantages to some over others" (Webster's Collegiate Dictionary 918 (10th ed. 1997));[24] the word *advantage* as "a factor or circumstance of benefit to its possessor" (Webster's Collegiate Dictionary 17 (10th ed. 1997));[25] the word *prejudice* as "injury or damage resulting from some judgment or action of another in disregard of

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[24]*See also Andrew v. Farmers' & Merchants' State Bank*, 247 N.W. 797, 799 (Iowa 1933) (stating that the word *preference* has been defined, when used in a general sense, as the act of preferring one thing above another; choice of one thing rather than another; estimation of one thing more than another; the state of being preferred or chosen before others); *Choctaw, O. & G. Ry. v. State*, 84 S.W. 502, 503 (Ark. 1904) (stating that the idea conveyed by the word *preference* is that, as between two persons occupying the same situation or relation, one has been preferred over the other, or granted certain privileges or facilities that were not extended to the other); *Keller v. State*, 31 S.E. 92, 95 (Ga. 1898) (stating that *preference* means the act of preferring one thing above another; estimation of the thing more than another; choice of one thing rather than another); *Weir v. Baker*, 29 A.2d 269, 272 (Ct. App. Md. 1942) (stating that, in a general sense, *preference* is the act of preferring one thing above another; choice of one rather than another; the state of being chosen or preferred before others).

[25]*See also In re Lakeland Development Corp.*, 152 N.W.2d 758, 767 (Minn. 1967) (stating that the word *advantage* affirmatively connotes elements of opportunity, benefit, or profit, and negatively suggests absence of sacrifice, harm, or loss); *State v. Cloud*, 176 So.2d 620, 622 (La. 1965) (stating that the word *advantage* means gain, benefit, profit, superiority, or favored position); *In re Krause's Estate*, 21 P.2d 268, 270 (Wash. 1933) (stating that benefit simply means profit, fruit, *advantage*); *Dubow v. Gottinello*, 149 A. 768, 769 (Conn. 1930) (stating that the word benefit means *advantage*, gain, or profit); *Ferrigino v. Keasbey*, 106 A. 445, 447 (Conn. 1919) (stating that word benefit means *advantage*, gain, or profit); *Winthrop Co. v. Clinton*, 46 A. 435, 437 (Pa. 1900) (stating that the word benefit means *advantage*, gain, or profit; its manifest signification is anything that works to the *advantage* or gain of the recipient); *Stowell v. Stowell's Executor*, 8 A. 738, 740 (Vt. 1887) (stating that the word *advantage* is a synonym of *benefit*); *Duvall v. State*, 166 N.E. 603, 604 (App. Ct. Ind. 1929) (stating that the word *advantage* is defined as any state, condition, circumstance, opportunity, or means favorable to success, prosperity, interest, reputation, or any desired end).

one's rights" (Webster's Collegiate Dictionary 919 (10th ed. 1997));[26] and the word *disadvantage* as "loss or damage" (Webster's Collegiate Dictionary 329 (10th ed. 1997)).[27] I find that, under section 202(b) of the Packers and Stockyards Act, giving an advantage to any person and not to other similarly situated persons is making or giving a preference; that conferring a benefit on any person and not on all similarly situated persons is making or giving an advantage; that subjecting any person to any injury or damage and not subjecting all similarly situated persons to the same injury or damage is subjecting the injured or damaged person to prejudice; and subjecting any person to any loss or damage and not subjecting all similarly situated persons to the same loss or damage is subjecting the person who suffers the loss or damage to a disadvantage.

Respondent has refused to purchase cattle under the terms of the Beef Marketing Agreement at feedlots other than feedlots that are members of the Beef Marketing Group (Answer at 3; Tr. 591-604, 980, 1143, 1198, 1341-43, 1703, 3549, 3648-50). Respondent's refusal to purchase cattle under the terms of the Beef Marketing Agreement from feedlots other than those in the Beef Marketing Group is not based on any characteristic unique to the members of the Beef Marketing Group. Mr. Borck, the

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[26]*See also Benedict v. State*, 89 N.W.2d 82, 85 (Neb. 1958) (citing Black's Law Dictionary (1891 ed.) as defining *prejudice* as meaning injury or loss); *State v. Caporale*, 89 A. 1034, 1035 (N.J. 1914) (stating that the word *prejudice* in its generic sense means to cause any harm or damage or loss).

[27]*See generally State v. Nelson*, 504 P.2d 211, 214 (Kan. 1972) (stating that this court has defined *prejudicial* as "hurtful," "injurious," "*disadvantageous*"); *Prunty v. Consolidated Fuel & Light Co.*, 108 P. 802, 803 (Kan. 1910) (stating that "[i]n Webster's Universal Dictionary, . . . as synonyms of 'prejudicial' are given 'hurtful,' 'injurious,' '*disadvantageous*.'" (Emphasis added.))

Beef Marketing Group's founder, testified that Beef Marketing Group members are diverse, are not required to meet any qualifications for membership, and are not required to meet any qualifications for continued membership (Tr. 3773-76). Moreover, Respondent's refusal to purchase cattle under the terms of the Beef Marketing Agreement at feedlots that are not members of the Beef Marketing Group is not the consequence of any difference between the quality of cattle available from Beef Marketing Group members and the quality of cattle available from other feedlots. The terms of the Beef Marketing Agreement do not impose any quality specifications on cattle to be purchased by Respondent (CX 2 at 2; Tr. 1766, 1792, 1813-14, 1878, 1935, 1947, 3814), and the record establishes that the cattle that Respondent purchased at feedlots that are not members of the Beef Marketing Group were comparable to cattle purchased at feedlots that are members of the Beef Marketing Group (CX 9 at 44, 56, 68, 80, 104; Tr. 455, 586, 2060-66).

I agree with Complainant that Respondent's failure to make the terms of the Beef Marketing Agreement available to all similarly situated feedlots in Kansas is a discriminatory practice because Respondent, by its failure to offer the terms of the Beef Marketing Agreement to all similarly situated feedlots, is treating similar entities differently.

Further, I agree with Complainant that the pricing terms of the Beef Marketing Agreement, the testimony of industry witnesses, and exhibits introduced into evidence by Complainant establish that Respondent paid more for cattle at feedlots that are members of the Beef Marketing Group than Respondent paid for similar cattle at

feedlots that are not members of the Beef Marketing Group. Thus, Respondent conferred a preference or advantage on Beef Marketing Group members and their producer customers and subjected similarly situated feedlots that are not members of the Beef Marketing Group and their producer customers to a prejudice or disadvantage. Specifically, cattle purchased under the terms of the Beef Marketing Agreement were priced using the highest price paid in Kansas for 500 cattle during the week of sale ("Kansas practical top"), as reported by the United States Department of Agriculture (CX 2 at 2, Cash Contract ¶ A), adjusted for quality.[28] Respondent's expert witness, Jerry Hausman, admitted that Respondent paid the Kansas practical top price or more for cattle placed at Beef Marketing Group feedlots, 80 percent of the time (RX 18 at 3, RX 46 at 3; Tr. 4010-11). Thus, under the terms of the Beef Marketing Agreement, Respondent guaranteed members of the Beef Marketing Group and their producer customers a price based on the top price for the week no matter when the top price was established. Respondent did not offer this advantage to feedlots that were not members of the Beef Marketing Group.

Feedlot operators testified that Respondent paid higher prices for cattle placed with Beef Marketing Group members than Respondent paid for cattle placed at other feedlots (Tr. 772-73, 780-81, 784, 931, 979), and Respondent's data establishes that Respondent gave the members of the Beef Marketing Group and their producer

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[28]In August 1994, the basis for bidding under the Beef Marketing Agreement was changed to the reported Kansas top price for 2,500 cattle or more, and in November 1995, the basis for bidding was again changed to a negotiated middle point between the Kansas top price for 2,500 cattle or more and the Kansas top price paid during the week by Respondent (in weeks when the two prices were different) (Tr. 3515-16, 3656).

customers a pricing advantage after the Beef Marketing Agreement went into effect (CX 5 at 65-66, CX 9 at 10-12; Tr. 2019-22).

Complainant further contends that in addition to preferential prices, Respondent gives three non-price advantages to members of the Beef Marketing Group, *viz.*: (1) a powerful marketing technique; (2) additional time in which to accept or reject bids; and (3) detailed carcass information (Complainant's Appeal Pet. at 58-62).

I agree with Complainant. When selecting a feedlot at which to place cattle, producer customers consider the marketing options available through each feedlot (Tr. 1786, 1860-61), including whether the feedlot has entered into the Beef Marketing Agreement with Respondent (Tr. 1750, 1814). One cattle producer testified that he would select a feedlot that had entered into the Beef Marketing Agreement with Respondent if choosing between two otherwise equal feedlots (Tr. 1779, 1795). Thus, Respondent gives feedlots that are members of the Beef Marketing Group a marketing technique that is not available to feedlots that are not members of the Beef Marketing Group. This marketing technique provides feedlots that are members of the Beef Marketing Group with a competitive advantage over feedlots that are not members of the Beef Marketing Group.

Further, the Beef Marketing Agreement provides that members of the Beef Marketing Group and their producer customers have at least 3 days to accept or reject bids made by Respondent (Tr. 1766-67). Feedlots that are not members of the Beef Marketing Group and their producer customers are required to accept bids made by

Respondent during a period that ranges from immediately after the bid is made to overnight (Tr. 693-94, 969, 1084-85, 1260, 1699, 1767, 1861, 1936-37).

The extended period within which Respondent's bids for cattle placed at feedlots that are members of the Beef Marketing Group could be accepted has value (Tr. 975, 1084, 1138-39, 1193, 1260, 1767, 3744-45), and this extended period for the acceptance of bids provides members of the Beef Marketing Group and their producer customers with a competitive advantage over feedlots that are not members of the Beef Marketing Group and their producer customers.

Moreover, under the Beef Marketing Agreement, Respondent provides Beef Marketing Group members with detailed carcass performance information (Tr. 3514, 3749-50). Although carcass performance information is sometimes made available to feedlot operators and cattle producers who request it (Tr. 986, 1078-79, 1134, 1188, 1256, 1335, 1585, 1619, 1694, 1812), Respondent provides more extensive carcass performance information to Beef Marketing Group members and their producer customers, and provides it on a more routine basis, than such information is available to feedlots that are not members of the Beef Marketing Group (Tr. 3750). Feedlot operators and producers seeking the same carcass performance information as Respondent gives to members of the Beef Marketing Group at no cost, must purchase the information at a cost of between $4 and $6 per head (Tr. 1694, 3811-12). Beef Marketing Group members and their producer customers are able to use the carcass performance information to reduce the number of days they feed cattle by more than 11 days (Tr.

3813-14); thereby reducing feed and other costs associated with feeding cattle at a feedlot.

Thus, Respondent's use of the Beef Marketing Agreement gives members of the Beef Marketing Group and their customers a preference and an advantage and subjects feedlots which are not members of the Beef Marketing Group and their producer customers to a prejudice and a disadvantage.

Sixth, Complainant contends that the Chief ALJ erred when he failed to find that Respondent's refusal to offer the terms of the Beef Marketing Agreement to similarly situated feedlots in Kansas is unjustly discriminatory and the preferences and advantages given to Beef Marketing Group members and their producer customers are undue and unreasonable and the prejudices and disadvantages to which feedlots that are not members of the Beef Marketing Group and their producer customers are subjected are undue and unreasonable (Complainant's Appeal Pet. at 65-94).

The term *unjustly discriminatory* as used in section 202(a) of the Packers and Stockyards Act and the terms *undue or unreasonable preference or advantage* and *undue or unreasonable prejudice or disadvantage* as used in section 202(b) of the Packers and Stockyards Act are not defined in the Packers and Stockyards Act. Instead, the meaning of these terms must be determined according to the facts of each case within the purposes of the Packers and Stockyards Act.[29]

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[29]*See Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1454 (10th Cir. 1988); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 930 (10th Cir. 1974); *Capitol Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir. 1965); *Swift & Co. v. Wallace*, 105 F.2d 848, 854-55 (7th Cir. 1939); *Rowse v. Platte Valley*

(continued...)

This case is close and I find that Respondent's failure to make terms of the Beef Marketing Agreement available to all similarly situated feedlots in Kansas is a discriminatory practice and that Respondent gives members of the Beef Marketing Group a preference and an advantage and subjects feedlots that are not members of the Beef Marketing Group to prejudice and disadvantage. However, as discussed in this Decision and Order, *supra*, Complainant has failed to prove that Respondent's use of the Beef Marketing Agreement harmed feedlots that are not members of the Beef Marketing Group or their producer customers, and I agree with the Chief ALJ that Complainant has not proven by a preponderance of the evidence that Respondent's use of the Beef Marketing Agreement is *unjustly* discriminatory or that Respondent gives Beef Marketing Group members an *undue* or *unreasonable* preference or advantage or subjects feedlots that are not members of the Beef Marketing Group to an *undue* or *unreasonable* prejudice or disadvantage.

Seventh, Complainant contends that the Chief ALJ erred when he concluded that the Beef Marketing Agreement does not cause the type of harm that the Packers and Stockyards Act is designed to prevent (Complainant's Appeal Pet. at 94-104).

I agree with Complainant that the Chief ALJ erred when he concluded that the Beef Marketing Agreement does not cause the type of harm that the Packers and Stockyards Act is designed to prevent. Specifically, I find that Respondent's right of first

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[29](...continued)
Livestock, Inc., 604 F. Supp. 1463, 1466 (D. Neb. 1985) (memorandum opinion); *United States v. Hulings*, 484 F. Supp. 562, 566-67 (D. Kan. 1980); *Guenther v. Morehead*, 272 F. Supp. 721, 728 (S.D. Iowa 1967).

refusal under the Beef Marketing Agreement has the effect or potential effect of reducing competition.

Respondent argues and the Chief ALJ found that Beef Marketing Group members give Respondent the right of first refusal under the Beef Marketing Agreement.[30]

While Complainant contends that Respondent does not have a right of first refusal under the Beef Marketing Agreement, Respondent states that the evidence fully supports that it has the right of first refusal under the Beef Marketing Agreement and that the right of first refusal is important to Respondent, as follows:

> It is clear, based on the evidence in the record, that the right of first refusal exists and that it has significant value to IBP. The [Complainant's] own witnesses recognized not only that the right exists, but also that it has a value that accounts for some, if not all, of the 43 cent per cwt. price difference pointed to by the [Complainant]. (PFF, ¶¶ 69-71).
>
> The right of first refusal should have come as no surprise to [GIPSA]. IBP's head cattle buyer, Bruce Bass, explained to [GIPSA] investigators as early as January 5, 1995[,] that IBP had a right of first refusal at BMG feedyards, and that the failure of Mull Feedyards and Pratt Feeders to adhere scrupulously to the right led to disputes between them and IBP. This information was recorded in a contemporaneous memorandum by [GIPSA] investigators and forwarded to the Chief of the Packers Branch, Jay Johnson, who acted as [GIPSA's] representative during all twenty days of the hearing. (RX-19).
>
> Nevertheless, [Complainant] asserts that "there was no right of first refusal under the Beef Marketing Agreement." (Complainant's Proposed Findings of Fact, p. 79). In support of this astounding position, [Complainant] cites the testimony of producers who placed their cattle at

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[30]See Prehearing Memorandum of IBP, inc., at 13, 17; IBP, inc[.]'s Proposed Findings of Fact and Post-Hearing Memorandum at 31-34; IBP's Response to Complainant's Proposed Findings of Fact, Conclusions, and Order at 10-14; Initial Decision and Order at 17-20; Oral Argument of June 8, 1998 (Tr. 65, 67, 71, 75-76).

two of the BMG feedyards (Great Bend Feeders and Pratt Feeders) and were unaware of the right of first refusal to IBP. All of their testimony proves that they did not know about the right. Given that a producer's sale negotiation is normally conducted by the feedyard, and not by the producer, the ignorance of some producers concerning the right of first refusal is hardly surprising.

In any event, the testimony cited by the [Complainant] does not even fully support its position. For example, one of the producer witnesses cited by the [Complainant], Walter Krier, admitted that he knew IBP had a right of first refusal on certain BMG cattle; he was simply unsure about the parameters of that right. When questioned by the Chief Administrative Law Judge, Mr. Krier testified as follows:

> Q. IBP gives you a bid of whatever, a par bid.
>
> A. A par bid.
>
> Q. You do not like it. You say I am not going to take that. Another packer gives you a bid 50 cents higher. At that point in time, before you accept the other packer's bid does IBP have a right to come back and say okay, we will give you the 50 cents?
>
> A. I don't know.
>
> Q. You don't know?
>
> A. I don't know about that, Your Honor. I don't know.

(Krier Tr. 1874).

David May (the former assistant feedyard manager at Great Bend Feeders) explained why all of his customers may not have known about the right of first refusal. As May testified:

> Q. Now would you expect that all of those cattle owners who fed cattle at Great Bend would be aware of IBP's right of first refusal?
>
> A. No, not necessarily. We did -- this was not a circumstance that arose very often and we really did not try to confuse the owners with a lot of the details of this

program that was relatively new to them so we would not necessarily have made a point of saying now we have to give IBP the right of first refusal.

Q. Did IBP ever actually exercise its right of first refusal?

A. Yes, I believe they did.

(May Tr. 3913).

With respect to producers with cattle at Pratt Feeders, they were even less likely to be made aware of the right of first refusal: Pratt's involvement with the BMG arrangement lasted only a short time and ended because Pratt did not comply with the right. (PFF, ¶ 73). IBP's strict enforcement of its right of first refusal with Pratt clearly highlights both its existence and its importance to IBP. This information was supplied to [GIPSA] in January 1995, and it was confirmed in this proceeding by the testimony of Jerry Bohn (the operator of Pratt), Lee Borck (the leader of the BMG), and by Bruce Bass (IBP's head cattle buyer). (RX-19) (Bohn Tr. 463) (PFF, ¶ 73).

Witnesses in the best position to know the terms of the BMG arrangement, such as the negotiators of the agreement (Lee Borck and Bruce Bass) testified, without contradiction, that the right did indeed exist. (PFF, ¶¶ 69, 72, 75). [Complainant] argues the right of first refusal did not exist because it was "inferred." In support, [Complainant] cites Lee Borck, who acknowledged the right does not appear in a cursory, one-page summary of the arrangement. (Complainant's Proposed Findings of Fact, p. 79). Yet Mr. Borck testified time and time again that the right of first refusal did exist even if it was not set forth in the partial summary. (Borck Tr. 3734-38, 3755-57, 3796-99, 3802-04).

It should hardly surprise [GIPSA] that the full terms of the BMG arrangement were never recorded in a single writing. [GIPSA] knew as early as January 5, 1995[,] that most of IBP's special arrangements with feedyards are based on oral agreements. (RX-19). [Complainant] also recognizes in other contexts that the partial written summary was incomplete. Thus, [Complainant] maintains that "[a]lthough the Beef Marketing Arrangement is silent with respect to exclusivity, IBP refused to make its terms available to sellers of cattle who did not belong to the Beef Marketing Group." (Complainant's Proposed Findings of Fact, p. 22). The

> record is clear that the BMG arrangement in practice included the right of first refusal, regardless of what the summary says.

IBP's Response to Complainant's Proposed Findings of Fact, Conclusions, and Order at 10-14 (emphasis in original).

The Chief ALJ rejected Complainant's argument that Respondent did not have the right of first refusal under the Beef Marketing Agreement and found that the evidence supports a finding that Respondent has a right of first refusal, as follows:

> 1. Right of First Refusal
>
> Under the agreement, Respondent initially had a right of first refusal on all cattle for which it bid even or better. Subsequently, the right was expanded to include cattle on which Respondent bid "minus 50."
>
> Complainant asserts that Respondent did not have a right of first refusal under the agreement, citing testimony from cattle producers who fed cattle at Great Bend Feeders and Pratt Feeders, who did not know about that term. It is true that several producers were unaware that the right existed; however, most of them were also unaware of the extended delivery term, the existence of which Complainant does not dispute. (Tr. 1764-65, 1789-90, 1824, 1874, 1944-45). The former assistant feedlot manager at Great Bend explained that he did not provide producers with all of the details of the agreement because he did not want them to be unnecessarily confused. (Tr. 3913). Pratt sold under the terms of the agreement for only one year, so it is unlikely that all of its customers would be aware of every term.
>
> Complainant also maintains that the right of first refusal did not exist because it was not enumerated in a one page summary of terms signed by Lee Borck and Bruce Bass. (CX 2 at 2). Complainant refers to the memorandum as the "Beef Marketing Agreement," and insists that it represents the Beef Marketing Agreement in its entirety. Complainant, however, cannot bypass the intent of the parties, and unilaterally decide that the memorandum was a complete integration of the terms of the agreement. Complainant did not offer any evidence to show that terms are limited to those contained in the memorandum; and, in fact, the evidence establishes that the agreement between BMG and Respondent was intended to, and did, contain additional terms, including a right of first refusal.

> Several witnesses, including those testifying for the government, stated that the right of first refusal existed. Bruce Bass and Lee Borck, who negotiated the agreement both testified that there was a right of first refusal. (Tr. 3512-13, 3734). Jerry Bohn, the general manager of Pratt feedyards testified for the government that the right of first refusal was part of the agreement; and explained that a disagreement over that term caused Pratt to stop selling under the agreement. (Tr. 462). Ray Palenske, an IBP buyer, and Marvin Stilgenbauer an Excel buyer, also testified for the government that there was a right of first refusal. (Tr. 830, 1595). Finally, Jay Johnson, Chief of the Packer Branch, of P&S, testified as a representative of the agency that IBP had a right of first refusal, and that the right had a value. He further stated that he knew the right existed at least as early as January 1995. (Tr. 3231-32). Assertions that the right did not exist are, therefore, inconsistent with the evidence of record.

Initial Decision and Order at 17-18 (footnotes omitted).

While I made minor changes to the Chief ALJ's discussion regarding Respondent's right of first refusal, I agree with Respondent and the Chief ALJ that Respondent has the right of first refusal under the Beef Marketing Agreement.

Moreover, I agree with Complainant that the right of first refusal, as explained by Respondent, suppresses the bidding process (competition); and therefore constitutes an unfair practice in violation of the Packers and Stockyards Act.

Two of Respondent's witnesses testified that Respondent's right of first refusal under the Beef Marketing Agreement suppresses the bidding process. Bruce Bass, head cattle buyer for Respondent, testified, as follows:

> BY MR. BAUMGARTNER:
>
> Q. The government has suggested that IBP could buy all the cattle it wanted in Kansas simply by bidding more. Would simply bidding more have put you in the same position that the Beef Marketing Group arrangement did?
>
> A. No.

Q. Can you explain that?

A. It -- it would -- it would -- the right of first refusal allowed us to not have to bid more. I mean, it might -- we might have to bid more than maybe our initial bid, but we didn't have to bid more than the top bid. And in any other set of circumstances, the ethics of the business is such that sometimes they'll let you buy them for a quarter more per hundred weight, but usually it takes at least 50 cents. And -- so if -- like our last example, if Monfort said, you know, "I'll give you 67," and if he decided, "Well, I think I'll try this one more time," if the owner was a non-BMG group and we didn't have the first right of refusal and he said, "I think I'll try this more one [sic] time," he might call IBP and say, you know, "I bid 67. Would you give me 68"? And if we said, "No, but I'll give you 67," he'd say, "Too bad. If I'm going to sell them for 67, I'm going to sell them to Monfort because they bid it first." Wherein, you know, the other way around if it were a Beef Marketing Group feedyard and, you know, we had bid even or better on the cattle, they would have to come back to us and offer them to us at 67. Therein we wouldn't have to pay that extra $25, $50, whatever it was that feedyard owner determined that he should have more than that bid in order to make it worth his while to sell them to someone else.

Tr. 3526-27.

Jerry Hausman, a recognized expert in the field of econometrics, called by Respondent, states in his written testimony that Respondent's right of first refusal suppresses bidding, as follows:

> . . . by agreeing to give IBP a right of first refusal on pens of cattle that were judged by the IBP buyer as being of equal or better quality to cattle being sold at the Kansas top price, BMG members reduced the likelihood of aggressive bidding for these pens by other packers.

RX 46 at 5.

Similarly, Professor Hausman testified that Respondent's right of first refusal suppresses competition, as follows:

[BY MR. BAUMGARTNER:]

Q. I place on the easel RX-1 and what I'd like to ask you to do is go through this exhibit and compare for us the BMG arrangement with the traditional method of buying cattle from the standpoint of the non-price conditions of sale.

A. Okay. Well, the first one that I referred to would be number two and that is that IBP had the right of first refusal in all cattle which was even or better so that's helpful to IBP that it's going to reduce competition from other packers and it's also going to allow them to utilize their personnel better to buy cattle from other yards and to reduce haggling at the BMG yards so that's certainly something of value to IBP.

Tr. 3949-50.

Further, Jay Johnson, Chief of the Packer Branch, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, testified that Respondent has a right of first refusal, and that the right has a value (Tr. 3231-32). Mr. Johnson further testified that Respondent's right of first refusal under the Beef Marketing Agreement stifles competition, as follows:

[BY MS. WATERFIELD:]

Q. Now, we've heard some testimony throughout this hearing about the right of first refusal. Are you familiar with that term?

A. Yes, I am.

Q. Is there a traditional or customary right of first refusal in the cattle industry?

A. Yes.

Q. What is your understanding of the customary right of first refusal?

A. Normally, what's customary in the cattle industry is for a right of first refusal if IBP was to go out and offer $65 for some cattle and a competitor came in and offered $65.50, the seller then would go back to

IBP and say do you want those cattle at $66 which would have been the next 50 cent increment. And that is typically how right of first refusal is in the cattle business. That means that they will go back to them and give them an opportunity to bid one more time at the next increment.

Q. Now, have you been present for all the testimony in this hearing?

A. Yes, I have.

Q. Were you present when testimony was given with respect to the right of first refusal under the terms of the Beef Marketing Agreement?

A. Yes, I was.

Q. Is the, well, first of all, would you describe the right of first refusal under the terms of the Beef Marketing Agreement as you understand it?

A. As I understand the Beef Marketing Groups and IBP's relationship as far as the right of first refusal, using a similar scenario as I just discussed, that if IBP, there's two different ways actually.

One is if IBP had offered $65 for the cattle earlier in the week and a competitor came in and offered $65.50, then the seller was obligated to go back to the feedlot and offer those cattle to IBP at $65.50 or the same thing as their competitor. Just a matching of the price, not a one upping of the price.

And I think also the way it was described as well is if IBP had offered to buy cattle under the terms of the agreement and, for instance, offered a par bid or even a par or 50 cents above bid on cattle and when the commitment deadline ended, which during the early portion of the agreement back in 1994 was that it was Wednesday.

Once the cattle feeder decided that he did not want to accept that even bid and then someone came in later in the week and offered them a specific dollar amount of for say $65 again, under the terms of the agreement, as I understand it, IBP had opportunity to go back and get those cattle at $65. All they had to do was match the competitors, not increase the bid.

Q. And does the Agency consider the right of first refusal under the terms of the Beef Marketing Agreement to be the same as the customary right of first refusal?

A. No, we do not.

Q. What's different about the right of first refusal under the agreement?

A. We believe that under the agreement, that the right of first refusal is a violation of the Packers and Stockyards Act and is unfair, an unfair practice.

Q. Why?

A. Because it results in -- it's an anti-competitive activity that does not promote competition, but in fact stifles competition.

Q. Does the Agency have a position with respect to whether the right of first refusal as included in the terms of the Beef Marketing Agreement would justify a 43 cent preference?

A. Could you ask me that again, please?

Q. Does the Agency have a position with respect to the right of first refusal under the terms of the agreement as to whether or not that right of first refusal would justify a 43 cent preference?

A. Yes, we do.

Q. What is the position, sir?

A. The position is that this would be an unlawful act. Therefore, it would not justify the price difference.

. . . .

JUDGE PALMER: Well, let me bore in here a little bit. Can you give any reason why -- strike that. Can you give any background, anything that would make you say the right of first refusal is an unfair practice? I don't care where you get it from. You can get it from another industry. You get it from other practices here in Packers and Stockyards, anything at all that says that a right of first refusal is an unfair practice.

> THE WITNESS: My basis for making the statement that it's an unfair practice is that it precludes them from competing. If I could make an illustration of if you were going out to buy land, there was two parcels of land out there, and the first parcel of land comes up and you walk over to the other guy over there and you say, you know.
>
> Rather than me bid and you bid and we raised the price up, you take this one and I'll take that one. Or you bid as high as you want to bid and then I will come in and I'll match the same price. So we both pay the same price.
>
> So the auction starts. There's nobody really pushing the price. The price stays stagnant at a level and you're both able to get your needs. And rather than if you both were going head-to-head competing for that initial piece of land, the competition would in theory drive the price up if you both wanted that same building. Demand would increase.

Tr. 4412-15, 4439-40.

I find that the effect or potential effect of Respondent's right of first refusal under the Beef Marketing Agreement is to suppress competition. Respondent's right of first refusal under the Beef Marketing Agreement provides that Respondent may obtain cattle placed in feedlots that are members of the Beef Marketing Group by matching the previous high bid, rather than by bidding a higher price than previously bid. Respondent's right to acquire cattle by matching the previous high bid has the potential of discouraging others from bidding on cattle and necessarily restricts competition because Respondent's right of first refusal obviates Respondent's need to compete for cattle placed at Beef Marketing Group feedlots in order to obtain those cattle. Instead, Respondent's right of first refusal allows Respondent to enter a bid, await, but not participate in, any additional bidding, and obtain cattle merely by matching any bid that may be higher than Respondent's bid. Therefore, Respondent's right of first refusal under the Beef Marketing Agreement violates section 202 of the Packers and Stockyards

Act (7 U.S.C. § 192) because it has the effect or potential effect of reducing competition.[31]

For the foregoing reasons the following Order should be issued.

Order

Respondent, IBP, inc., it agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from entering into or continuing any agreement, contract, arrangement, or understanding containing a right of first refusal which provides that Respondent may obtain livestock by matching the highest previous bid for the livestock.

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[31]*See generally Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) (holding that an agreement by a packer and dealer not to compete for the purchase of hogs whereby the dealer purchased the hogs without competition and the packer purchased the hogs from the dealer at the price paid by the dealer to the original seller was a practice in violation of section 202 of the Packers and Stockyards Act because the essential nature and necessary result of the arrangement or practice was to eliminate competition); *In re San Jose Valley Veal, Inc.*, 34 Agric. Dec. 966, 985 (1975) (holding that a packer that permits a person with whom the packer should be competing for the purchase of livestock to purchase livestock for the packer's account, violates section 202(a) and 202(e) of the Packers and Stockyards Act (7 U.S.C. § 192(a), (e)) since such arrangement has the effect or potential effect of restricting competition, whether or not such purpose was intended by the purchasing arrangement).

The provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

Done at Washington, D.C.

July 31, 1998

William G. Jenson
Judicial Officer